

**In the Supreme Court of the
United States**

OCTOBER TERM, 197..

No. **77 - 4**

IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION,
CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT
WESTERN SUGAR COMPANY, AND U AND I INCORPORATED,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA,
Respondent.

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
(Civil No. C75-1123, et al.)
Real Parties in Interest.

(See Appendix A hereto for complete list of
Real Parties in Interest and Case Numbers)

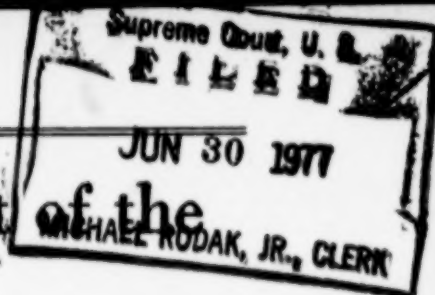
**Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	14
1. The Decision of the Court Below Is in Conflict with the Decision of This Court in <i>Berger</i> That the Factual Averments Submitted in Support of a Motion to Disqualify Under 28 U.S.C. Section 144 Must Be Accepted as True. The Same Rule Is Applicable to 28 U.S.C. Section 455(a) in Accord with the Clear Congressional Intent	17
2. The Court Below Erroneously Permitted the District Judge to Rely Upon the "Duty to Sit" Concept, Rejected by Congress in Its 1974 Amendment to Section 455(a)	19
3. The Court Below Erroneously Approved the Action of the District Judge in Deciding That the Facts Alleged (as "Evaluated" by the Judge) Were Insufficient to Show Actual Bias or Prejudice, Rather Than Deciding Whether the Facts Alleged Were Sufficient to Warrant the Moving Parties Litigant Reasonably to Question the Partiality of the Judge	21

TABLE OF CONTENTS

	Page
4. If the Unexplained Decision of the Court Below Is Deemed to Rest Upon a Holding That Mandamus Was Not the Proper Remedy, It Is Erroneous and in Conflict With the Decisions of the Courts of Appeals of Other Circuits	25
Conclusion	26
Appendix A	
Real Parties in Interest in Cases Consolidated in the Northern District of California	1a
Appendix B	
Order of the Court of Appeals	9a
Memorandum Decision Re Disqualification	10a

TABLE OF AUTHORITIES

CASES	Pages
Berger v. United States, 255 U.S. 22 (1921)	14, 15, 17, 18, 19, 25
Connelly v. United States District Court, 191 F.2d 692 (9th Cir. 1951)	26
Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975), <i>cert. denied</i> , 425 U.S. 944 (1976)	15, 20
Dr. Bonham's Case, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (K.B. 1609)	16
Edwards v. United States, 334 F.2d 360 (5th Cir. 1964), <i>cert. denied</i> , 379 U.S. 1000 (1965)	20
Hodgson v. Liquor Salesmen's Local No. 2, 444 F.2d 1344 (2d Cir. 1971)	18
In Re Rodgers, 537 F.2d 1196 (4th Cir. 1976)	25
Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976)	18
Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir. 1962), <i>cert. denied</i> , 372 U.S. 915 (1963)	25, 26
Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975) (<i>en bane</i>), <i>cert. denied</i> , 425 U.S. 944 (1976)	15, 18, 19, 20, 21, 22, 23, 24
Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir.), <i>cert. denied</i> , 406 U.S. 976 (1972)	18, 25
Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966)	25
Spires v. Hearst Corp., 420 F. Supp. 304 (C.D.Cal. 1976)	19

	Pages
United States v. Hoffa, 382 F.2d 856 (6th Cir. 1967), <i>cert. denied</i> , 390 U.S. 924 (1968)	18
United States v. Parker, 23 F. Supp. 880 (D.N.J. 1938), <i>aff'd</i> , 103 F.2d 857 (3d Cir.), <i>cert. denied</i> , 307 U.S. 642 (1939)	18
United States v. Ritter, 540 F.2d 459 (10th Cir.), <i>cert.</i> <i>denied</i> , U.S., 97 S.Ct. 370 (1976)....	14, 15, 22, 23, 25
Willenbring v. United States, 306 F. 2d 944 (9th Cir. 1962)	18

STATUTES

28 U.S.C. § 144	3, 14, 17, 18, 19, 25
28 U.S.C. § 455(a)	3, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25
28 U.S.C. § 1254(1)	2

MISCELLANEOUS

13 Wright, Miller & Cooper, Federal Practice and Procedure § 3549 (1975)	20
Code of Judicial Conduct, Canon 3C	15, 16
S. Rep. No. 419, 93d Cong., 1st Sess. (1973)	16, 19
S. Rep. No. 419, 93d Cong., 2d Sess. (1974)	20
H.R. Rep. No. 1453, 93d Cong., 2d Sess., <i>reprinted in</i> [1974] U.S. Code Cong. & Ad. News 6351	19, 20
120 Cong. Rec. 36269 (1974)	19
Note, <i>Disqualification of Federal Judges for Bias</i> <i>Under 28 U.S.C. Section 144 and Revised Section</i> <i>455</i> , 45 Fordham L. Rev. 139 (1976)	15, 17, 18, 19, 20
Miller, <i>Public Confidence in the Judiciary: Some Notes</i> <i>and Reflections</i> , 35 Law and Contemp. Prob. 69 (1970)	15
I COKE INSTITUTES *141a	16

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(See Appendix A hereto for complete list of
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, The Amalgamated Sugar Company, Amstar
Corporation, California Beet Growers Association, Ltd.,
The Great Western Sugar Company, and U and I Incorpo-
rated, respectfully petition this Court for a writ of certi-

orari to review an order of the Court of Appeals for the Ninth Circuit entered in this case on February 28, 1977.

OPINIONS BELOW

The court of appeals rendered no opinion. Its order (App. B p. 9a) is unreported. The opinion of the district court (App. B pp. 10a-16a) is unreported.¹

JURISDICTION

The order of the court of appeals was entered on February 28, 1977. On May 23, 1977, Mr. Justice Rehnquist granted an extension of time to June 30, 1977, within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This litigation consists of over one hundred actions, known as the "Sugar Antitrust Litigation", which have been consolidated for pretrial proceedings in the United States District Court for the Northern District of California before the Honorable George H. Boldt, senior district judge, sitting by special assignment. Petitioners, certain defendants below, filed a motion to disqualify Judge Boldt, accompanied by affidavits of bias and prejudice, certificates of counsel, and other supporting affidavits and exhibits setting forth facts which demonstrated Judge Boldt's bias and prejudice against defendants and in favor of plaintiffs and their counsel, and on the basis of which Judge Boldt's impartiality was questioned. Judge Boldt denied the motion

1. Appendix A sets out the list of cases consolidated for pretrial purposes in the Northern District of California under MDL 201. Appendix B sets out the unreported opinions below. Appendix C is submitted as a separate volume and contains the pertinent portions of the record below. Page references to Appendix C correspond to those of the exhibits submitted to the court below.

and the court of appeals denied defendants' petition for a writ of mandamus seeking to vacate his ruling. The questions presented are:

1. Did the court of appeals err in denying a petition for a writ of mandamus seeking review of an order of the district judge refusing to disqualify himself where:

a. The affidavits submitted by petitioners set forth a series of *ex parte* communications between the district judge and lead counsel for the adverse parties concerning significant contested issues, and false statements by the district judge concerning matters discussed in these communications, and

b. The district judge applied an erroneous legal standard under the applicable statutes by (1) refusing to accept as true the facts set forth in petitioners' affidavits, (2) refusing to consider whether, assuming such facts to be true, "his impartiality might reasonably be questioned," or was, in fact, reasonably questioned by the parties; and (3) grounding his decision on the "duty to sit" concept specifically rejected by Congress in the 1974 amendment to 28 U.S.C. § 455(a)?

2. Is mandamus the appropriate remedy to review an order of a district judge refusing to disqualify himself when sufficient grounds have been presented by the moving parties?

STATUTES INVOLVED

28 U.S.C. § 455(a):

"Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 144:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

STATEMENT OF THE CASE

Petitioners are among the defendants in over one hundred private treble damage antitrust actions filed throughout the United States and consolidated in San Francisco before the Honorable George H. Boldt, a senior judge of the Western District of Washington, sitting by special assignment.

In the course of this litigation a number of incidents have occurred which convinced petitioners that Judge Boldt is biased and prejudiced in favor of plaintiffs and that, at a minimum, his actions have been such that his impartiality might reasonably be questioned. Accordingly, petitioners filed a motion requesting that Judge Boldt disqualify himself. This motion was accompanied by affidavits of bias and prejudice, certificates of counsel affirming that the motion was made in good faith, and affidavits and exhibits setting forth the facts upon which the motion was grounded (App. C pp. 1-186; 326-385).

Judge Boldt denied petitioners' motion (App. B pp. 10a-16a), and the court of appeals, without opinion, denied a petition for a writ of mandamus seeking to vacate Judge Boldt's order (App. B p. 9a).

The affidavits and exhibits in support of petitioners' motion to disqualify Judge Boldt set out the following facts:

After the assignment of these cases to Judge Boldt, William H. Ferguson, a member of the Seattle bar and a close personal friend of Judge Boldt (App. C pp. 114-115), became *ad hoc* chairman, and later permanent chairman, of plaintiffs' steering committee (App. C pp. 149-150; 577). From Mr. Ferguson's first connection with these proceedings, there occurred a series of unauthorized *ex parte* communications between Judge Boldt and Mr. Ferguson. These *ex parte* contacts, and the circumstances surrounding them, are as follows:

Mr. Ferguson was counsel for plaintiffs in a private, "non-class action," antitrust suit—the "1812" case²—brought before Judge Boldt in the Western District of Washington against certain sugar companies some two years before the inception of the present consolidated class action litigation. Mr. Ferguson is not, and never has been, retained as counsel of record for plaintiffs in any of the consolidated class action cases.

After the present class actions were commenced, Mr. Ferguson advised counsel for defendants in the 1812 case that he opposed consolidation of that action with the other sugar cases in San Francisco because it would delay his trial and be "prejudicial to his clients' interests" (App. C p. 139). However, on the evening before the first pretrial conference in the consolidated actions, Mr. Ferguson advised counsel for one of the defendants that he now favored consolidation of his case because "they [counsel for plaintiffs in the consolidated cases] have made me an offer

2. 1812 *Distributing Company, et al. v. Utah-Idaho Sugar Company, et al.*, No. 633-72C2 (W.D. Wash.).

I can't refuse," and that "the Judge [Boldt] wants the 1812 case consolidated" (App. C p. 150). Mr. Ferguson later admitted that he obtained the latter information in an *ex parte* conference with Judge Boldt (App. C p. 243). This *ex parte* conference is especially disturbing because one of the petitioners, a party to the 1812 case, had opposed the consolidation of that case with the San Francisco cases and had not been given an opportunity to present its views to the court. In addition, the consolidation of the 1812 case with the San Francisco cases put Mr. Ferguson in a position where he could become—as he later did become—chairman of plaintiffs' steering committee in the consolidated cases.

In fact, at the first pretrial conference on July 8, 1975, Judge Boldt, consistent with the information conveyed in his *ex parte* conference with Mr. Ferguson and without the opportunity for briefing or oral argument by opposing parties, transferred Mr. Ferguson's 1812 action and consolidated it with the later-filed class actions in San Francisco (App. C pp. 632-634). That disposition led ultimately to Mr. Ferguson's appointment by Judge Boldt as chairman of plaintiffs' steering committee in the consolidated actions. The appointment took place in the following way:

On July 27, 1975, Mr. Ferguson requested that defendants' then liaison counsel (Stephen V. Bomse) meet with him and with plaintiffs' liaison counsel (Josef D. Cooper) and Judge Boldt in Mr. Ferguson's room at the Fairmont Hotel in San Francisco, the hotel at which Mr. Ferguson was staying during the Ninth Circuit Judicial Conference. The purpose of the meeting was to confer regarding the formulation of Pretrial Order No. 1, the general wording of which had been agreed upon previously by the parties. Upon Mr. Bomse's arrival at Mr. Ferguson's hotel room, he found Mr. Ferguson and Judge Boldt already present

and learned that Pretrial Order No. 1 already had been signed (App. C pp. 149-150).

During this conference, Judge Boldt advised Mr. Bomse that Mr. Ferguson had been designated chairman of plaintiffs' steering committee. Subsequent to the conference, Mr. Cooper, who arrived after Mr. Bomse, inquired privately of Mr. Bomse as to the circumstances under which Mr. Ferguson had been designated by Judge Boldt as chairman, *inasmuch as this had not been expressly agreed upon by plaintiffs' counsel* (App. C pp. 149-150). The inference is inescapable that Mr. Ferguson was appointed by Judge Boldt on the basis of *ex parte* representations made to him by Mr. Ferguson. The appointment was made in the absence of any other counsel and prior to any express agreement by plaintiffs' counsel that Mr. Ferguson should be appointed as chairman.

Less than a month later, on August 18, 1975, Mr. Ferguson had another *ex parte* conference with Judge Boldt, at which he discussed with the judge the establishment of a date for a class action hearing and "the procedure from here on out, as far as it was scheduled" (App. C p. 64). His discussion included many contested matters of such significance that certain of plaintiffs' counsel, in a memorandum submitted to the court, subsequently referred to this *ex parte* conference as "the second pretrial conference" (App. C p. 612). In fact, Mr. Ferguson felt that certain of the matters discussed were of sufficient importance to warrant a letter describing those matters, after the fact, to defendants' liaison counsel (App. C pp. 64-65). Defendants' liaison counsel protested this *ex parte* conference in a letter to Mr. Ferguson (App. C pp. 66-68) which read in part:

"From your letter, it appears that not only did you appear *ex parte*, but that you discussed with the Judge

future scheduling of events in the case. We do not approve of that practice and certainly hope that it will not be repeated.

"We do not know and, thus, cannot comment upon the prevailing practice in your district. However, in the Northern District of California (to which these cases have been assigned and by whose rules they are governed), no lawyer would be permitted to communicate directly with the Court about pending litigation in the absence of opposing counsel" (App. C p. 67).

Notwithstanding defendants' protests, however, the *ex parte* conferences continued.

In November, 1975, during the pendency of proceedings for class certification, Mr. Ferguson made an *ex parte* telephone call to Judge Boldt to disclose to him that one of the defendants, Holly Sugar Corporation, had entered into a tentative settlement agreement with certain plaintiffs (App. C p. 112). Mr. Ferguson also informed Judge Boldt that plaintiffs were negotiating with two other defendants and that he would take up with Judge Boldt a proposal for the presentation of these settlements when the judge returned to Tacoma (App. C p. 247). Shortly thereafter, plaintiffs in the "Ferguson group" entered into tentative settlement agreements with two other defendants, California & Hawaiian Sugar Company and Union Sugar Division, Consolidated Foods Corporation (App. C p. 898).³

This *ex parte* conversation with Judge Boldt concerning the tentative settlements involved matters of crucial importance since, as is demonstrated below, the effectuation of those settlements was conditioned upon Judge Boldt's

3. The three settling defendants, all previously indicted by the government, are not parties to this petition. Petitioners are various "non-settling" defendants, including several not indicted by the government.

certifying classes which were being proposed by Mr. Ferguson's group, and which were being opposed by petitioners.⁴

On November 26, 1975, a few weeks following Mr. Ferguson's *ex parte* disclosure of the tentative settlements to Judge Boldt, Lee Freeman, counsel for the State of Illinois, plaintiff in one of the consolidated class actions, wrote a letter to Judge Boldt objecting to the court's consideration of the Holly settlement during the pendency of the class certification proceedings on the ground that the settlement excluded consumers on whose behalf Mr. Freeman sought to have classes certified. Mr. Freeman's letter specifically pointed out that the proposed settlement was conditioned upon Judge Boldt's certifying the classes supported by the "Ferguson group," and denying all others. The letter contained a description of the classes contemplated by the Holly settlement and proposed by the "Ferguson group" (App. C pp. 120-125).

On December 9, 1975, prior to a pretrial conference, Judge Boldt called liaison counsel into chambers and discussed with them the Freeman letter. Judge Boldt had read the letter and by his comments evidenced that he was aware of its substantive contents, including the fact that the settlements were contingent upon the court's approving the "Ferguson group's" classes and denying others (App. C pp. 132-133; App. C pp. 150-151). Indeed, at the pretrial

4. In fact, on May 20, 1976, Judge Boldt, over the opposition of petitioners and of counsel for many of the plaintiffs not in the "Ferguson group," certified, in substance, the classes Mr. Ferguson had proposed which made it possible to effectuate the settlements which Mr. Ferguson's group had reached with the three settling defendants. As pointed out hereafter, Judge Boldt's knowledge of the classes which would have to be certified in order to effectuate the Ferguson settlements, and his denial of that knowledge, has itself become a crucial issue bearing on Judge Boldt's bias and prejudice and his appearance of partiality.

conference on the following day, the Judge stated on the record:

"THE COURT: This is somewhat analogous to the business of ruling on the objections to evidence in a non-jury case. You have to read the exhibit to decide whether you should read it" (App. C p. 908).

On May 20, 1976, Judge Boldt certified classes which met the conditions required to make the "Ferguson group's" settlements effective (App. C pp. 477-539).

Thereafter, Judge Boldt made a series of false statements and misrepresentations concerning his knowledge, at the time he made his order, of the fact that the proposed settlements were conditioned upon his certification of the classes supported by the "Ferguson group." These misstatements finally compelled petitioners to conclude that they had no alternative but to file a motion to disqualify Judge Boldt if these cases were to be heard by a judge free from bias and prejudice and whose impartiality reasonably could not be questioned.

As noted above, Judge Boldt was first advised by an *ex parte* communication from Mr. Ferguson that a tentative settlement had been reached between plaintiffs and Holly Sugar Corporation and that settlements were expected with two other defendants. Thereafter, by Mr. Freeman's letter of November 26, 1975, the judge was advised of the classes proposed by the Ferguson group—classes which the court would have to establish if the settlements negotiated by the Ferguson group were to be effectuated. Nevertheless, on December 10, 1975, Judge Boldt stated on the record that Mr. Ferguson had told him *only* that there was one settlement and the amount thereof (App. C p. 906). And in Pretrial Order No. 12, dated August 25, 1976, Judge Boldt represented, in flat contradiction of the facts, that:

"Prior thereto [August 17, 1976]⁵ the Court had not learned the contents of the settlement agreements in any manner whatever" (App. C p. 580).

Judge Boldt's misstatements concerning his knowledge, prior to his class action ruling, of the terms of the Ferguson settlements and their relationship to the contested class certification proceedings reached even more disturbing proportions in a hearing held on September 9, 1976, in the *Fertilizer Cases*.⁶ The *Fertilizer Cases* are a series of unrelated cases pending in the Western District of Washington in which Mr. Ferguson also represents certain plaintiffs and in which Judge Boldt's disqualification to hear the class motion there involved had been sought, based, in part, on his relationship with Mr. Ferguson and his conduct in the *Sugar Litigation*.⁷

At the hearing on the motion to disqualify him from participating in the *Fertilizer Cases*, Judge Boldt attempted to explain his conduct with regard to the sugar settlements negotiated on behalf of the "Ferguson group." Among other things he admitted that he had learned of the proposed settlements in an *ex parte* telephone call from Mr. Ferguson, but that:

5. On August 17, 1976—three months *after* his order certifying classes—the court allowed plaintiffs to file an amended settlement agreement (App. C p. 1062). The original Holly agreement had been filed on December 5, 1975 (App. C p. 26).

6. The *Northwest Fertilizer Cases*, No. MF-75-1 (W.D. Wash.).

7. The *Fertilizer Cases* had initially been assigned to Judge Neill who, because of certain other commitments, requested Judge Boldt to hear and determine pending proceedings for class certification supported by Mr. Ferguson. Upon learning of the assignment of the class certification proceedings to Judge Boldt, the defendants in the *Fertilizer Cases* immediately filed a motion to disqualify Judge Boldt. Judge Boldt refused to disqualify himself, but voluntarily stepped down and reassigned the matter to Judge Neill (App. C pp. 116-117).

"I said to him that, of course, I did not want to have any information from him or anyone else concerning the details of the negotiations, but that I thought that he might appropriately lodge the material under seal with the Clerk. . . . The Freeman letter, which I received, I think was dated the 26th, so I must have gotten it several days later. I happen to know Lee Freeman quite well, and his forceful style in presenting his contentions I am not unacquainted with. I glanced through his letter just enough to see that he was much incensed about the matter . . . But the net result was that the material was lodged under seal as I had suggested, and that is all that I acquired in the way of information about the settlements at that time" (App. C pp. 112-113).

Contrary to Judge Boldt's statements on the record in the *Fertilizer* hearing, the settlement materials were not filed under seal and petitioners were not made privy to any suggestion by the court that they be filed under seal. Furthermore, contrary to Judge Boldt's statements concerning the Freeman letter, he had, in fact, read the letter upon its receipt, acknowledged having read it at the December 10, 1975 pretrial conference in the sugar litigation,⁸ and understood its salient terms.⁹

Even more disturbing than Judge Boldt's false statement concerning the filing of the settlement papers under seal is the fact that he used the statement in support of an unwarranted attack on the credibility and good faith of one of petitioners' counsel, Mr. Raven. In response to a reference by counsel for a moving party in the *Fertilizer* cases to an affidavit filed by Mr. Raven in the sugar proceedings relating to Judge Boldt's knowledge of the terms of the settlements, Judge Boldt replied:

8. App. C. p. 908. See pp. 9-10 *supra*.

9. App. C. pp. 132-133; 150-151. See p. 9 *supra*.

"THE COURT: . . . I had them (the settlement papers) sealed and lodged under seal, and . . . I did not, in any way, read or have anything to do with those matters until they were opened in open court? [sic] He (Mr. Raven) makes no mention of that . . . (App. C p. 83).

As noted above, Judge Boldt had never directed that the settlement papers be lodged under seal and they never, in fact, were under seal. And, consequently, they were never, as Judge Boldt represented, "opened in open court."

These misrepresentations were made by Judge Boldt in an effort to convey the impression that he had not been influenced in the performance of his judicial duties by his relationship and *ex parte* contacts with Mr. Ferguson and, in particular, that his class certification decision, which effectuated the settlements the "Ferguson group" had negotiated, had not been influenced by his knowledge of the conditional nature of those settlements prior to his class action ruling. It is manifestly improper and indicative of prejudice for a judge to make false statements of fact relevant to a contested matter in an effort to attempt to eliminate the impression of bias which accompanied his acts. Further, nothing could more destroy the trust of the parties in the impartiality of the judge.

The motion to disqualify Judge Boldt was heard on December 6, 1976. Immediately upon conclusion of the oral argument, Judge Boldt read from the bench a typewritten "MEMORANDUM DECISION RE DISQUALIFICATION" in which he denied the motion (App. B pp. 10a-16a).

In his memorandum opinion, Judge Boldt:

1. Ignored certain crucial averments of fact set forth in affidavits submitted in support of the motion, particularly those dealing with the various *ex parte* communications between himself and Mr. Ferguson.

2. Refused to accept the factual averments upon which the motion was based as true for the purpose of ruling upon the motion, as required by this Court's opinion in *Berger v. United States*, 255 U.S. 22 (1921), and instead substituted his own purported recollection as to what had occurred.

3. Applied his own subjective test to determine whether, based on his version of the facts, "his impartiality might reasonably be questioned" within the meaning of 28 U.S.C. § 455(a), rather than an objective test which would have determined whether a person in petitioners' position, based on the facts set forth in the record, might reasonably have questioned the court's impartiality, thus disregarding the objective test mandated by the Congress in its 1974 amendment to 28 U.S.C. § 455(a) and followed by the Court of Appeals for the Tenth Circuit in *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, U.S., 97 S.Ct. 370 (1976).

4. Invoked the "duty to sit" concept, which concept Congress had expressly rejected in enacting the 1974 amendment to 28 U.S.C. § 455(a).

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with the decision of this Court in *Berger v. United States*, 255 U.S. 22 (1921), and with the decisions of the courts of appeals of other circuits (cited at pages 18-19, *infra*) following and applying the rule of the *Berger* case, that the factual averments in an affidavit of bias and prejudice under 28 U.S.C. § 144 must be accepted by the judge as true in determining his disqualification.

The decision of the court below, in approving application of the "duty to sit" concept rejected by Congress in the 1974 amendment to 28 U.S.C. § 455(a), is in conflict with the

decisions of the Court of Appeals for the Fifth Circuit in *Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), and *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

The decision of the court below is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, U.S., 97 S.Ct. 370 (1976), insofar as the court failed to apply the mandate of 28 U.S.C. § 455(a), as amended in 1974, that a judge shall disqualify himself if his "impartiality might reasonably be questioned" by a party litigant.

If the unexplained decision of the court below is deemed to rest upon a holding that mandamus is not the proper remedy to correct the erroneous failure of a judge to disqualify himself, its decision is in conflict with *Berger* and with the decisions of the courts of appeals of other circuits cited at pages 25-26, *infra*.

The decision of the court below involves important questions of federal law relating to the essential supervisory power of this Court over the conduct of the lower federal courts which have not been, but should be, settled by this Court.¹⁰

In 1974, in partial response to concern over the standards applied by judges of the lower federal courts in ruling on motions questioning their impartiality, Congress amended Section 455 of the Judicial Code by enacting into law the standards embodied in Canon 3C of the Code of

10. See Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139 (1976) [hereinafter cited as *Disqualification of Federal Judges for Bias*]; Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 LAW AND CONTEMP. PROB. 69 (1970).

Judicial Conduct.¹¹ The legislative history of the amendment evidences a clear Congressional intent to broaden the test for disqualification in order to preserve not only the fact but the *appearance* of impartiality, which is essential to public confidence in the judiciary. Thus, the Senate Report on the amendment stated:

"Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which 'his impartiality might reasonably be questioned.' This sets up an objective standard, rather than the subjective standard set forth in the existing statute . . . This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case" (S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973)).

The decision below upholds the application of a subjective standard to the "facts" as found by the district judge. It thus disregards the law and the Congressional intent which seeks to ensure the vitality of Coke's famous principle, "*aliquis non debet esse iudex in propria causa*"—no man shall be a judge in his own case.¹²

11. Canon 3C, in relevant part, provides:

"(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . ."

12. I COKE INSTITUTES *141a; *Dr. Bonham's Case*, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (K.B. 1609).

Commentators have focused on the problems inherent in a judge's being asked to rule on his own ability to be fair and impartial:

The nature and importance of the issues presented by this petition to the administration of justice in the federal courts, we submit, urgently calls for the exercise of this Court's jurisdiction.

1. The Decision of the Court Below Is in Conflict with the Decision of This Court in *Berger* That the Factual Averments Submitted in Support of a Motion to Disqualify Under 28 U.S.C. Section 144 Must Be Accepted as True. The Same Rule Is Applicable to 28 U.S.C. Section 455(a) in Accord with the Clear Congressional Intent.

In *Berger v. United States*, 255 U.S. 22 (1921), this Court held that factual averments submitted by a party in an affidavit of bias and prejudice under 28 U.S.C. Section 144 must be accepted as true for purposes of a request to disqualify, and that the trial court may determine only whether the facts, as alleged, are legally sufficient to give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U.S. at 33-34). This Court stated the principle underlying its decision: "To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section [Section 144] is directed" (255 U.S. at 36).

"The appearance that the judge's decision on recusal has been influenced by extrajudicial factors will be heightened if the judge explains or denies the charge of bias in conjunction with a decision against disqualification. Despite this danger, it is not unusual for a judge who considers the allegations false to disavow them in this manner (footnote omitted) because under current procedures there is no other forum in which to do so. The judge's rebuttal of facts contained in the party's sworn affidavit can be seen as evidence of a dispute between the judge and litigant and thus tends to have the inadvertent effect of bolstering the party's contention that the judge is biased against him" (*Disqualification of Federal Judges for Bias*, *supra* note 10, at 157).

The *Berger* decision has been followed and applied by the courts of appeals of a number of the circuits.¹³ As the third circuit recently said in *Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976), "[n]either the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge's personal knowledge to the contrary."¹⁴ But in direct conflict with the instructions of *Berger*, Judge Boldt based his refusal to step down on his version of the facts, which were in sharp contrast to the facts set out in the affidavits. For example, among other things, Judge Boldt found in his opinion, contrary to the facts set out in the affidavits:

"... I had no part whatever in suggesting or selecting Mr. Ferguson . . . as chairman of plaintiffs' steering committee" (App. B p. 11a);

and again:

"... I did not read the letter closely or recognize the import of any of the settlement conditions stated in the Freeman letter . . ." (App. B p. 12a).

13. *Mims v. Shapp*, 541 F.2d 415 (3d Cir. 1976); *Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 100 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); *Pfizer Inc. v. Lord*, 456 F.2d 532, 537 (8th Cir.), cert. denied, 406 U.S. 976 (1972); *Hodgson v. Liquor Salesmen's Local No. 2*, 444 F.2d 1344 (2d Cir. 1971); *Willenbring v. United States*, 306 F.2d 944 (9th Cir. 1962).

14. Despite *Berger's* clear mandate, a number of the lower federal courts in disqualification proceedings have disavowed averments which they deemed or represented to be false. (See, e.g., *United States v. Hoffa*, 382 F.2d 856, 858-9 (6th Cir. 1967), cert. denied, 390 U.S. 924 (1968); *United States v. Parker*, 23 F. Supp. 880, 883-886 (D.N.J. 1938), aff'd, 103 F.2d 857 (3d Cir.), cert. denied, 307 U.S. 642 (1939), and have contrived in a variety of other ways to avoid the legal significance of facts set forth in affidavits of bias and prejudice submitted under Section 144 (See cases cited in *Disqualification of Federal Judges for Bias*, supra note 10, at 142). Indeed, at least one circuit judge has gone so far as to query whether *Berger* is any longer authoritative (*Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 107 (5th Cir. 1975) (en banc) (Gee, J. specially con-

The rule of the *Berger* case has been expressly applied to disqualification proceedings under amended section 455 (e.g., *Spires v. Hearst Corp.*, 420 F.Supp. 304, 305-306 (C.D.Cal. 1976)). These rulings are in accordance with reason and with the expressed Congressional intent to broaden the standards for disqualification in the 1974 amendment.¹⁵ As noted above, Congress intended that a judge disqualify himself "if there is a *reasonable factual basis*" (emphasis added) for doubting his impartiality.¹⁶ Adherence to this articulated purpose requires that it not be left to the challenged judge to evaluate the factual averments submitted in support of the motion. Otherwise, the appearance cannot be avoided that the judge's decision on recusal also has been improperly influenced by extra-judicial factors, heightening the movant's belief in his partiality.¹⁷

2. The Court Below Erroneously Permitted the District Judge to Rely Upon the "Duty to Sit" Concept, Rejected by Congress in Its 1974 Amendment to Section 455(a).

Prior to the 1974 amendment of Section 455, the lower courts engrafted upon the disqualification statutes a judi-

curing), cert. denied, 425 U.S. 944 (1976)). These decisions emphasize the importance of an authoritative restatement by this Court of the applicable legal principles.

15. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5, reprinted in [1974] U.S. Code Cong. & Ad. News 6351, 6354-55; 120 Cong. Rec. 36269 (1974).

16. S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973). See p. 16, supra. Although affidavits of bias and prejudice, expressly required to support disqualification under Section 144, are not required under the broadened Section 455, whatever facts may be set forth by the parties in support of disqualification under Section 455, as pointed out above, must be accepted on a standard no less objective than that which this Court in *Berger* deemed applicable to Section 144.

17. See *Disqualification of Federal Judges for Bias*, supra note 10, at 157.

cial gloss whereby a judge challenged for bias was deemed to have a "duty to sit" on a case. This concept in turn permitted a narrow construction of disqualification statutes, including what amounted to a presumption against recusal.¹⁸

In amending Section 455, Congress expressly rejected the "duty to sit" concept. The House Report on the new legislation noted:

"The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system" (H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6355).¹⁹

Several lower court decisions, including two by the Fifth Circuit, have recognized and enforced Congress' abolition of the "duty to sit" concept.²⁰ In the case at bar, the district judge failed to implement the intent of Congress in amending Section 455(a), and denied petitioners' motion on the basis that (App. B p. 13a):

"It would be easy to escape those onerous duties by granting the motion for my disqualification. No matter how difficult or disagreeable, I have never in my entire

18. See, e.g., *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965); see generally, 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3549 (1975); *Disqualification of Federal Judges for Bias*, *supra* note 10, at 144-145.

19. See also S. Rep. No. 419, 93d Cong., 2d Sess. 5 (1974).

20. *Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976); *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

judicial career avoided or abandoned what I considered to be my judicial duty and I do not intend to do so now."

3. **The Court Below Erroneously Approved the Action of the District Judge in Deciding That the Facts Alleged (as "Evaluated" by the Judge) Were Insufficient to Show Actual Bias or Prejudice, Rather Than Deciding Whether the Facts Alleged Were Sufficient to Warrant the Moving Parties Litigant Reasonably to Question the Partiality of the Judge.**

In *Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), the majority of the court applied a "disinterested person" test to plaintiffs' motion to disqualify the trial judge:

"We also noted that § 455(a) was intended to substitute a 'reasonable factual basis—reasonable man test' in determining whether the judge should disqualify himself (citations omitted).

Considering first the § 455(a) claim, and the relevant facts and circumstances, we are of the view that a reasonable man would not infer that Judge Varner's 'impartiality might reasonably be questioned'" (524 F.2d at 103).

This test, in effect, requires a movant to demonstrate that actual bias is likely to exist. Recognizing this, Judge Tuttle's dissent, in which Judge Goldberg joined, considered the question of "reasonableness" from the perspective of the litigants—in that case, blacks denied admission to the state bar. Maintaining that the trial judge should have recused himself, the dissent said:

"It is my opinion that . . . the new amended § 455 . . . require[s] that the judge against whom an affidavit for bias is lodged must determine only whether the allegations are such as would cause a reasonable person

standing in the same relationship as does the affiant to believe that the challenged judge has a 'bent of mind that may prevent or impede impartiality of judgment.'" (citation omitted) (524 F.2d at 108).

• • •

"More importantly, however, it seems to me to be clear that both the Code and the new § 455, which now speak in the same terms, has set up a standard involving the reasonableness of the belief or fear of the litigant rather than the reasonable likelihood of the existence of actual lack of impartiality. It will be noted that the language speaks in terms of the judge's impartiality being reasonably 'questioned.' It does not speak in terms of his partiality being reasonably likely to exist" (524 F.2d at 109).²¹

The broader, objective, test advanced by the dissents in *Parrish* was adopted recently by the Tenth Circuit in *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.), cert. denied, U.S., 97 S. Ct. 370 (1976), in which a district court judge's refusal to disqualify himself pursuant to Section 455(a) was reversed on mandamus. The Court said:

"The final question, and that which disturbs us most, is whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists a reasonable likelihood that the cause will be tried with the impartiality that *litigants have a right to expect* in a United States district court. Unfortunately we cannot predict that it will be. Based upon all of the facts and considering the broad language of

21. Judge Wisdom also dissented, stating:

"I am in substantial agreement with Judge Tuttle's opinion. In particular, I would hold that, under *Berger* and the recent amendments to § 455, an affidavit alleging a judge's bias is sufficient if the facts alleged justify a reasonable belief on the part of the affiant that the judge may be biased. The principle involved is older than the concern Caesar had for Calpurnia's reputation" (524 F.2d at 112).

Section 455(a) requiring disqualification in any proceeding 'in which his impartiality might reasonably be questioned,' it is with reluctance that we conclude that the interests of justice require that the cause be tried by another judge, a judge from outside the district..." (emphasis added) (540 F.2d at 464).

In contrast to the *Ritter* decision and to the thoughtful dissents in *Parrish*, Judge Boldt failed to consider whether the totality of defendants' averments, taken as true, could lead the moving parties reasonably to question his impartiality. He held:

"The moving defendants' speculative and conjectural inference that I was influenced . . . is totally unreasonable, not supported by any established facts. . . .

"In my fully considered judgment, there is no *reasonable* basis either in fact or law for my disqualification in this litigation" (App. B. p. 13a).

In so holding, Judge Boldt not only insisted on his own version of the facts rather than accepting the facts stated in the moving parties' affidavits, as discussed above, but denied the motion based upon his purported finding that there was no reasonable basis for the *fact* of bias. The district judge, we submit, failed to determine, as he should have, whether the facts were such that his impartiality might reasonably be questioned by the parties defendant before him. Those parties, as set forth in their affidavits, had seen Mr. Ferguson, a long time and close friend of Judge Boldt, after an *ex parte* discussion with the judge and after receiving an "offer" from counsel for plaintiffs in the consolidated cases which "he could not refuse," change his mind about opposing the consolidation of a case he had filed in the Northwest with the class action *Sugar* cases pending in San Francisco; had seen Judge Boldt there-

after transfer that case to San Francisco without giving the defendants in that case (also defendants in the class action cases) an opportunity to express their opposition; had seen Mr. Ferguson thereafter appointed by the judge as chairman of the plaintiffs' steering committee in the consolidated cases on the basis of *ex parte* representations made to the judge by Mr. Ferguson and before all counsel for plaintiffs had agreed to his appointment; had seen Mr. Ferguson have other *ex parte* conferences with Judge Boldt, including at least one in which he notified the judge, *ex parte*, that the "Ferguson group" had negotiated a settlement with one defendant and that settlement negotiations were going on with two other defendants; had seen Judge Boldt advise that these settlements were conditioned upon his certifying the classes proposed by the "Ferguson group," and denying all other classes; had seen Judge Boldt thereafter certify the exact classes which would enable the "Ferguson group" to effectuate their settlement with the three defendants; and, finally, had seen Judge Boldt state, *falsely*, that he had had the Holly settlement agreement filed under seal, and also state, *falsely*, that at the time he made his class action ruling he had no knowledge of the terms of the proposed settlements, including knowledge of the fact that the settlements were conditioned upon his certifying the classes proposed by the "Ferguson group."

These "allegations are such as would cause a reasonable person standing in the same relationship [to the judge as the affiants] to believe that the challenged judge has a 'bent of mind that may prevent or impede impartiality of judgment'" (Judge Tuttle dissenting in *Parrish*, quoted *supra* at 22). The test articulated in the Fifth Circuit in the dissenting opinions in *Parrish*, and applied by the Tenth Cir-

cuit in *Ritter*, comports with the statutory objectives and conflicts with the decision below. We submit that this conflict is an important question which should be resolved by this Court.

4. If the Unexplained Decision of the Court Below Is Deemed to Rest Upon a Holding That Mandamus Was Not the Proper Remedy, It Is Erroneous and in Conflict with the Decisions of the Courts of Appeals of Other Circuits.

If defendants' right to a fair and impartial tribunal is to be vindicated, it is essential that the district court's denial of defendants' motion for disqualification be reviewed immediately and before a hearing on the merits. In *Berger v. United States*, 255 U.S. 22 (1921), this Court recognized that an appeal after final judgment of the denial of a motion to disqualify is inadequate:

"The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient" (255 U.S. at 36).

Predicated on this principle, lower appellate courts have repeatedly recognized that meritorious motions to disqualify pursuant to 28 U.S.C. Section 144 or Section 455 inherently present the exceptional circumstances which warrant issuance of the extraordinary writ of mandamus. See, e.g., *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, U.S., 97 S. Ct. 370, (1976); *In Re Rodgers*, 537 F.2d 1196 (4th Cir. 1976); *Pfizer Inc. v. Lord*, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972); *Rosen v. Sugarman*, 357 F.2d 794 (2d Cir. 1966); *Occidental Petroleum Corp. v. Chandler*, 303 F.2d 55 (10th Cir. 1962),

cert. denied, 372 U.S. 915 (1963); *Connelly v. United States District Court*, 191 F.2d 692, 693 n. 1 (9th Cir. 1951).

The *Sugar Antitrust Litigation* consists of over one-hundred cases filed in separate circuits and involving complex issues which are likely to take many years to resolve. Enormous litigation costs, in expense and in the time of courts and parties, will be incurred. It is manifest that the ability of the district judge to act impartially in the eyes of the litigants must in justice be decided now.

CONCLUSION

For the reasons above set forth we submit that the petition for a writ of certiorari should be granted.

Dated: June 30, 1977

Respectfully submitted,

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(Appendices follow)

Appendix A

Cases Consolidated in the Northern District of California

PLAINTIFF	CIVIL ACTIONS Nos.
Alpac Corp.	C 75-1731
American Bakeries Co.	C 75-2495
Amezcuca, Rene d/b/a Amezcuca Sales & Service	C 76-0701
Amick, Melvin	C 75-0505
Anthony J. Pizza Food Products Corp.	C 75-1123
State of Arizona	C 75-2581
Armand's, Inc.	C 75-2561
A & W Operations Inc.	C 75-0505
The Bakery, Inc.	C 76-2166
Baldi Candy Company	C 75-1122
Bel Air Mart Inc.	C 75-0041
Benner Tea Co.	C 75-1957
Berkeley, California, Unified School District	C 75-0782
Blum's of San Francisco, Inc.	C 75-0117
Bodines Inc.	C 75-1128
Bresler Ice Cream Co.	C 75-1908
Brinker, Madelyne	C 76-0562
The Brothers' Restaurants Incorporated	C 75-1606
Brown & Haley	C 75-1731
Bumbleberry Enterprises Inc.	C 75-0504
State of California	C 75-1401 C-76-0561
California Foods Inc.	C 75-0504
State of Colorado	C 75-1931

Consolidated Dairy Products, Inc.	C 75-1731
C F S	C 75-1121
C F S Continental-Los Angeles Inc.	C 75-2605
Contemporary Foods, Inc.	C 74-2711
Continental-Artic, Inc.	C 75-2605
Continental Big Red, Inc.	C 75-2605
Continental Coffee Co. of Colorado	C 75-2605
Continental Coffee Co. of Houston	C 75-2605
Continental Decatur, Inc.	C 75-2605
Continental G & M Foods, Inc.	C 75-2605
Continental-Hoxie, Inc.	C 75-2605
Continental-Indianapolis, Inc.	C 75-2605
Continental-Keil, Inc.	C 75-2605
Continental Mills, Inc.	C 75-1731
Continental-Minnesota, Inc.	C 75-2605
Continental-National, Inc.	C 75-2605
Continental North Chicago, Inc.	C 75-2605
Continental Palomar of Arizona, Inc.	C 75-2605
Continental-Panetta, Inc.	C 75-2605
Continental-P.M., Inc.	C 75-2605
Continental-San Diego, Inc.	C 75-2605
Continental South Chicago, Inc.	C 75-2605
Continental Warehouse Market, Inc.	C 75-2605
Copper Penny Corporation	C 75-1909
	C 75-1910
Courtesy Food Mart	C 75-2247

"Store No. 2," Courtesy Food Mart	C 75-2247
Crescent Manufacturing Co.	C 75-1731
The Dickinson Family, Inc.	C 75-2593
DiGiorgio Corp.	C 76-0544
1812 Distributing Corp.	C 75-1731
Edwards' Old Orchard Restaurant Inc.	C 75-1121
E.H.R. Corporation	C 75-1909
	C 75-1910
Eng-Skell Company	C 74-2689
Ewald Bros., Inc.	C 75-1455
Fantasia Confections, Inc.	C 74-2728
	C 74-2727
Flavorland Foods Inc.	C 75-2619
Food Bowl Shopping Center	C 75-0504
Food Mart-Eureka	C 75-0504
Food Mart-McKinleyville	C 75-0504
Fortner-Farrell Enterprises, Inc.	C 75-0505
General Bottlers, Inc.	C 75-1546
General Host Corp.	C 75-1731
Genesis Group, Inc.	C 75-1120
Gibbs, James F.	C 75-0505
Goelitz Confectionery Company	C 76-0113
W.R. Grace & Co.	C 75-1131
	C 75-1731
Grandma Cookie Co.	C 75-2619
Grist Mill Co.	C 75-1555
Haley, Michael J. d/b/a Buttercup Bakery	C 75-0504

Hanson, Reuben J.	C 75-0505
Harold Freund Baking Co.	C 75-2190
Harold Freund Baking Co. of San Jose	C 75-2190
Health Unlimited of America, Inc.	C 75-0504
Heinemann's, Inc.	C 75-1123
Herb Alpert's Donut Shop, Inc.	C 75-1123
Holly House Foods, Inc.	C 75-0505
Home Juice Company	C 75-1128
E. O. Hudson, Sr.	C 75-0014
E. O. Hudson, Jr.	C 75-0014
State of Illinois	C 75-1124
Imperial Preserves, Inc.	C 76-0085
State of Indiana	C 76-0214
The International House of Pancakes	C 75-1909 C 75-1910 C 75-1911
International Industries, Inc.	C 75-1909 C 75-1910 C 75-1911
International Kings Table, Inc.	C 75-2561
International Kings Table of Lancaster, Inc.	C 75-2561
International Kings Table of Rosewood, Inc.	C 75-2561
Interstate Brands Corp.	C 76-0288 C 76-0280
Irish, Ralph E.	C 75-0505
ITT Continental Baking Co.	C 75-1544 C 75-1543
J.B. Big Boy Restaurants, Inc.	C 75-0504

Jianas Bros. Candy Co.	C 76-2194
John's Food Centers, Inc.	C 75-1824
Kalwest Corporation d/b/a Smitty's Pancake House	C 75-0505
State of Kansas	C 75-2350
Kelley, Farquhar & Co.	C 75-1130
King Kelly Marmalade Company	C 75-1545
Knotts Berry Farm	C 75-1545
The Kohl Corp.	C 75-1957
K-P Enterprises, Inc.	C 75-0505
Liberty Orchards Co., Inc.	C 75-1731
Love's Enterprises, Inc.	C 75-1909 C 75-1910 C 75-1911
M.A. Lopez Supermarket, Inc.	C 76-1438
Marlett, John M.	C 75-0505
Martinez, Ramiro d/b/a Piedras Negras Wholesale	C 76-0701
McCleary Industries, Inc.	C 75-1126
Merchants Restaurant, Inc.	C 75-1553
Merchants Snack Shop, Inc.	C 75-1553
Me Too, Inc.	C 75-1957
M.F.A. Milling Company	C 75-1808
Mid-American Dairymen, Inc.	C 76-1082
Milford Canning Company	C 75-2025
State of Minnesota	C 75-1456

Missouri Farmers Association, Inc.	C 75-1808
State of Montana	C 76-0533
Morris, David d/b/a Bread Garden Bakery	C 75-0504
Mother's Cake & Cookie Co.	C 75-1404
Nash-Finch Co.	C 75-1957
National Supermarkets, Inc.	C 75-1957
National Tea Co.	C 75-1957
Nesbitt Bottling Co. of El Monte	C 75-1546
State of Nevada	C 76-0719
Noel Canning Corp.	C 75-1731
Northwest Candy Co.	C 75-1454
Northwest Packing Co.	C 75-2619
Orange Gardens, Ltd.	C 75-0505
Orange Julius of America	C 75-2490
State of Oregon	C 75-1441
The Original House of Pies	C 75-1909
	C 75-1910
	C 75-1911
Owens Enterprises, Inc.	C 75-0505
Owens Inland Investments, Inc.	C 75-0505
Pacific Food Products	C 75-1731
The Page Milk Company	C 75-1696
The Paniplus Company	C 75-1973
Paoli's Restaurant, Inc.	C 75-2711
Passengers Restaurants, Inc.	C 75-2024
The Pastry Shop, Inc.	C 75-1957
Pearson Candy Co.	C 75-1973

Pepsi-Cola Bottling Co. of Topeka, Inc.	C 76-0702
Pepsi-Cola Bottling Co. of Yakima	C 75-1731
Piedmont Grocery Co.	C 75-0504
Plantation Baking Company, Inc.	C 75-1125
Plaza Corned Beef Center, Inc.	C 75-1121
Polunsky's Inc.	C 75-2605
Price Candy Co.	C 76-1082
Price Wholesale Grocery Incorporated	C 75-2605
Quad Lakes	C 75-0505
Quadro, Incorporated d/b/a Los Altos Ranchos Market	C 75-0504
Raleys, Inc.	C 75-0041
Randhurst Corned Beef Center, Inc.	C 75-1121
Reeser, Willis E.	C 75-0505
Regency Steak House, Inc.	C 75-1553
# 2 Regency Steak House, Inc.	C 75-1553
Richardson & Holland Corp.	C 75-1731
Saldana & Garza, Inc.	C 76-0701
Scandia Bakery	C 75-1424
Schulte, Inc.	C 75-0504
Schulze & Burch Biscuit Co.	C 75-1554
Schwan's Sales Enterprises, Inc.	C 75-2457
Scott, Jack d/b/a Scott's Food Service, Inc.	C 75-2561
S.C. Shannon Co.	C 75-1957
Seeco, Inc.	C 75-1131
Sethness Greenleaf, Inc.	C 75-2027
Sheppard, Robert L.	C 75-0505

Smith Cookie Co.	C 75-1730
Societe Candy Co.	C 75-1731
Steak-O-Rama, Inc.	C 75-1674
Steak-O-Rama No. 1, Inc.	C 75-1674
Sun Garden Packing Co.	C 75-2687
Superior Beverages Company, Inc.	C 75-1121
TAE Corp.	C 76-2195
T. C. H., Inc.	C 75-1123
Treasure Island Foods, Inc.	C 75-1127
Tri-R Vending Service Co.	C 75-2026
Tropical Preserving Company	C 75-1545
United A. G. Cooperative, Inc.	C 75-1756
Vallegra's Drive-In Markets, Inc.	C 75-0504
Valley Packers, Inc.	C 75-1130
Van Duyn Chocolate Shops, Inc.	C 75-1731
Vantage Enterprises, Inc.	C 75-0505
Villager Foods, Inc.	C 75-0117
State of Washington	C 75-1129
Washington Beverages, Inc.	C 75-1130
West Coast Growers & Packers, Inc.	C 76-1722
Whaley Enterprises, Inc.	C 75-0505
Whitevale Company, Inc.	C 75-0505
State of Wisconsin	C 75-2400
Zarda Brothers' Dairy, Inc.	C 75-1696
Zim's Restaurant, Inc.	C 74-2698 C 74-2695
Zion Industries, Inc.	C 75-1126

Appendix B

*United States Court of Appeals
for the United States*

In Re Sugar Antitrust Litigation
(MDL No. 201).

THE AMALGAMATED SUGAR COMPANY,
AMSTAR CORPORATION, CALIFORNIA BEET
GROWERS ASSOCIATION, LTD., THE GREAT
WESTERN SUGAR COMPANY & U & I
INCORPORATED,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORP.,
et al.,

Real Parties in Interest.

No. 77-1144
ORDER

Before: BROWNING and GOODWIN, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

/s/ JAMES R. BROWNING

/s/ ALFRED T. GOODWIN

U. S. Circuit Judges

Mo Cal 2/21/77

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Master File MDL-201

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Memorandum Decision re Disqualification

Hundreds of pages of memoranda, affidavits and exhibits have been filed either in support or opposition to my disqualification in this litigation. All of the memoranda submitted have been reviewed in detail and I am certain that all counsel are well aware of the substance of all of the arguments and contentions, as well as the applicable case and statutory law. Therefore, my ruling will be relatively brief and cover only a few of the most significant factors involved in the determination of the motion now presented for a ruling.

The Western Sugar Antitrust Litigation was assigned to me by an order dated June 2, 1975. Attached hereto is a copy of a memorandum dated June 9, 1975 addressed to all counsel of record at that time. The memorandum ordered that a first preliminary Pretrial Conference would be held at San Francisco July 8, 1975. It contained various directions for attention by counsel prior to the conference date, recommended that all counsel meet at San Francisco a day prior to the conference, either jointly or severally, hopefully to reach agreement on various matters. One of those matters was the selection by counsel of their respective liaison counsel. By the morning of the conference, to my great satisfaction, a considerable number of potentially controversial matters had been agreed upon, some of which, including the selection by counsel of their representatives and plaintiffs' steering committee, were

reported to the court by counsel immediately prior to convening of the conference. Thus, I had no part whatever in suggesting or selecting Mr. Ferguson either as a member of the plaintiffs' liaison counsel or as chairman of plaintiffs' steering committee.

The June 9, 1975 memorandum also directed prompt preparation, briefing and argument on class action as required by F. R. C. P. 23. Full and detailed briefing on class action was completed and argument on the motion was set for Tuesday, December 9, 1975.

From prior first-hand experience I had long been familiar with Rule 23 both before and after its major amendments. This experience was fresh in my mind and useful to me.

The questions presented in determining class action in the Sugar litigation were numerous and complicated. Among them was the request of some plaintiffs for individual consumer classes in specified states and potentially nationwide. This subject was thoroughly reviewed and considered by me in depth. From my personal consideration of the memoranda it was clear to me that individual consumer classes would present serious questions as to its manageability and were disapproved by a substantial number of highly respected authorities. Prior to oral argument, after special consideration of individual consumer classes, I considered it my duty to deny individual consumer classes, unless fully persuaded in oral argument that they were manageable and, in practice, advisable in the Sugar litigation. As it turned out, I was not so persuaded and ruled accordingly.

I first learned of the Holly settlement and the possibility of others, about two weeks prior to the Pretrial Conference set for December 9, 1975 by a telephone call from Mr. Ferguson. He did not offer to tell me, and I cautioned

him against mentioning, any details of the settlement until it could be presented to all counsel in open court at the forthcoming conference. A few days prior to the conference date I received a several-page letter from Lee Freeman which I "scanned" or "skimmed" enough to learn that Mr. Freeman was vehemently opposed to any action being taken on the proposed settlements until they were fully and properly prepared for submission to the court. At that time I did not read the letter closely or recognize the import of any of the settlement conditions stated in the Freeman letter and simply had no recall concerning the settlement conditions at the time of the meeting in my chambers December 9, 1975, which was held immediately before the conference convened.

The importance that the moving defendants place on an assumed or suspected causal connected between the settlement conditions stated in the Freeman letter and the denial of individual consumer classes by the Opinion and Order Re Class Actions entered May 20, 1976, requires the following comment:

The recent and extended Section 28 U.S.C. § 455(a) provides that:

"Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned." (Emphasis added).

Any person thinking or acting *reasonably* must reach his or her opinions and conclusions upon established *facts*, as distinguished from conjecture, suspicion, rumor or inferences drawn from other than established *facts*.

The granting of consumer classes was vigorously opposed by all defendants. Denial thereof in the class action order was contrary to Mr. Freeman's contentions but in accordance with defendants' contentions. It was of extreme importance and substantial value to all defendants, in-

cluding the moving defendants, because it eliminated extraordinarily large numbers of potential additional class action members as well as expenditure of great time, effort and expense to both defendants and plaintiffs. These facts of record directly and decisively negate the contention of the moving parties and their counsel that I was or appeared to be biased or prejudiced against either the defendants' lawyers or their clients. Indeed, if any reasonable inference indicating partiality on my part can be drawn from the indisputable facts above stated, it must have been in favor of the moving defendants rather than against them.

The moving defendants' speculative and conjectural inference that I was influenced to any extent whatever by what I learned of the proposed settlement conditions prior to rendering my decision denying individual consumer classes is totally unreasonable, not supported by any established facts, and inconsistent with my entire judicial career.

In my fully considered judgment, there is no *reasonable* basis either in fact or law for my disqualification in this litigation. This is an extensive litigation involving numerous problems and difficult decisions which may continue for an extended period in the future. It would be easy to escape those onerous duties by granting the motion for my disqualification. No matter how difficult or disagreeable, I have never in my entire judicial career avoided or abandoned what I considered to be my judicial duty and I do not intend to do so now.

Defendants' motion for disqualification is denied.

DONE IN OPEN COURT THIS 6th day of December, 1976.

/s/ George H. Boldt

GEORGE H. BOLDT

*Sr. United States District Judge
Sitting by Designation*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

June 9, 1975

Memorandum to: All Counsel

From: George H. Boldt, Sr., USDJ, WD Wash.

Subject: Sugar Industry Antitrust Litigation MDL-201

By now, presumably, counsel for all parties have received a copy of the Judicial Panel on Multidistrict Litigation Order assigning to me all of the non-government sugar industry civil antitrust actions, which assignment I have accepted. It seems highly desirable that a preliminary meeting be held with counsel for all parties at San Francisco with a view of considering and determining various ground rules and initial procedures appropriate in multidistrict litigations. Undoubtedly all counsel have had experience with this type of litigation and are well aware of these initial matters and we should be able to complete our preliminary meeting in one day.

Ordinarily, I would confer with the liaison attorneys by telephone to fix a date reasonably agreeable to all counsel; however, in this instance it is not possible. Accordingly I have chosen an early date that will, to a considerable extent avoid summer heat, vacations, etc. i.e., *10:00 a.m. Tuesday, July 8, 1975* at the courtroom assigned to me for that purpose at the United States District Courthouse in San Francisco.* With the considerable number of counsel involved in this litigation, it will be impossible to fully accommodate everyone in selecting dates for conferences. However, when liaison counsel are available they can and will minimize inconvenience for all as far as possible.

*Ceremonial Courtroom, 19th Floor U.S. District Courthouse, 450 Golden Gate Avenue.

A status report jointly prepared by counsel in each particular case shall be prepared, served and filed, with two copies thereof mailed to my chambers at P. O. Box 1993, Tacoma, Washington 98401, not later than June 30, 1975. This report should briefly summarize each and every procedure completed or in progress, copies of all prior court rulings and all other procedures or developments to this time. As of this date no procedure of any kind in any case shall be taken without express approval of this Court.

Proceedings in this litigation shall conform in all particulars to those specified in The Manual for Complex Litigation unless otherwise ordered by the Court. Counsel may apply for any modification that is considered to be more appropriate or expeditious than procedure recommended in the Manual. Any counsel not familiar with the Manual should promptly become familiar with it and particularly with respect to the early stages of this type of litigation.

Civil Rule 23 requires that applications for class action status shall be determined as soon as practicable after commencement of the action in which class action is sought. Therefore, counsel must be prepared to present their views concerning preparation for expeditious determination of the class action requests in this litigation. All proposals shall be in writing and include the specific procedures and proposed dates for their completion. When counsel have completed their meeting an agenda shall be prepared listing, in order of preference, all matters counsel propose to present at the preliminary meeting. The original and copies of the agenda shall be deposited at the Clerk's office where those desiring copies may pick them up Monday afternoon or Tuesday morning.

The Clerk's office in San Francisco is long experienced and capable in all matters directly or indirectly involving the Clerk in multidistrict litigation. Counsel unfamiliar with such matters should consult with the Clerk at San Francisco prior to the preliminary meeting with a view of becoming familiar with the procedures of that office designed to minimize time, effort and paper work performed by the Clerk.

Counsel are requested to meet jointly and/or severally in San Francisco on Monday, July 7 to select liaison counsel for all plaintiffs and defendants and to discuss and present to the Court proposed ways and means for expeditious pretrial preparation of all cases in this litigation.

1812 Distributing Corp. et al v. U&I et al, WD, Wash. No. 633-72C2, was not named as a party to the multidistrict proceedings and therefore not specified in the transfer order of the Panel. Since this case has been assigned to me from its inception and involves issues comparable to those in all cases in this litigation, counsel in that case have been requested to attend our meeting and fully participate therein.

In my judicial travels about the nation, it has been my pleasure to meet and come to know most cordially, many of the lawyers in antitrust practice. A good number of them are involved in this litigation and I look forward to continuing cordial relationships with them and developing the same relationship with those I meet for the first time on July 8, 1975.

In the Supreme Court of the
United States

OCTOBER TERM, 197....

No. 77 - 4

IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION,
CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT
WESTERN SUGAR COMPANY, AND U AND I INCORPORATED,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA,
Respondent.

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
(Civil No. C75-1123, et al.)
Real Parties in Interest.

(See Appendix A hereto for complete list of
Real Parties in Interest and Case Numbers)

Appendix C to Petition for a Writ of Certiorari to the
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ROBERT D. RAVEN
On Behalf of All Petitioners

**In the Supreme Court of the
United States**

OCTOBER TERM, 197....

No.

**IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)**

**THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION,
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Real Parties in Interest and Case Numbers)**

**Appendix C to Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

INDEX TO APPENDIX C

Beginning on
App. Page No.

Motion to Disqualify The Honorable George H. Boldt	1
-- Memorandum of Points and Authorities in Support of Motion to Disqualify	5
-- Letter of August 18, 1976 from William H. Ferguson to Lawrence Keeshan	64
-- Letter of August 21, 1975 from Stephen V. Bomse to William H. Ferguson	66
-- Transcript of Hearing of Septem- ber 9, 1976 in <u>Northwest</u> <u>Fertilizer</u> cases	69
-- Letter of November 26, 1975 from Lee A. Freeman and William J. Scott to The Honorable George H. Boldt	120
-- Letter of August 23, 1976 from Robert P. Mallory to The Honorable George H. Boldt	126
-- Affidavit of Robert D. Raven in Support of Motion to Disqualify, and Certificate of Good Faith, dated October 15, 1976	130
-- Affidavit of Marc P. Fairman in Support of Motion to Disqualify, dated October 15, 1976	137
-- Affidavit of John C. Reynolds in Support of Motion to Disqualify, dated October 14, 1976	140
-- Affidavit and Certificate of Good Faith of James F. Kirkham in Support of Motion to Disqualify, dated October 18, 1976	148
-- Affidavit of John M. Wunderli in Support of Motion to Dis- qualify, dated November 1, 1976	154

ii.

Beginning on
App. Page No.

-- Affidavit of John R. Lemke in Support of Motion to Disqualify, and Certificate of Counsel, dated October 14, 1976	160
-- Certificate of Paul Fitting, dated October 18, 1976	166
-- Affidavit of Peter J. Adolph in Support of Motion to Dis- qualify, dated October 12, 1976	167
-- Certificate of Service by James B. Young re Motion to Disqualify	171
Notice of Joinder by Certain Defendants in Motion to Disqualify	187
Plaintiffs' Reply to Motion to Disqualify The Honorable George H. Boldt	190
Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Disqualify The Honorable George H. Boldt	202
-- Affidavit of William H. Ferguson in Opposition to Motion to Disqualify, dated November 15, 1976	241
-- Affidavit of Josef D. Cooper in Opposition to Motion to Disqualify, dated November 15, 1976	253
-- Affidavit of Harold E. Kohn in Opposition to Motion to Dis- qualify, dated November 13, 1976	263
Memorandum of Illinois and Indiana in Opposition to Motion to Disqualify	266
Opposition of Certain Plaintiffs to Motion to Disqualify	272

iii.

Beginning on
App. Page No.

Plaintiffs' Motion for Leave to File Affidavit of Albert R. Malanca in Opposition to Motion to Disqualify	291
Supplemental Signatures to Plaintiffs' Opposition to Motion to Disqualify	298
Supplemental Signature of Colorado to Plaintiffs' Reply to Motion to Disqualify	313
Reply Memorandum of Defendants in Support of Motion to Disqualify The Honorable George H. Boldt	326
-- Supplemental Affidavit of James F. Kirkham in Support of Motion to Disqualify, dated November 24, 1976	371
-- Supplemental Affidavit of Robert D. Raven in Support of Motion to Disqualify, dated November 24, 1976	373
Adoption by Certain Defendants of Reply Memorandum in Support of Motion to Disqualify	386
Request for Establishment of Schedule for Consideration of Proposed Settlements, with original "Holly Settlement" attached (December, 1975)	388
Revised "Stipulation and Agreement of Settlement" of Certain Defendants and Certain Plaintiffs, lodged with Court August 17, 1976	427
Opinion and Order re Class Actions, dated May 20, 1976	477
Pretrial Order No. 1, dated July 24, 1975	541
Pretrial Order No. 12, dated August 25, 1976	579

iv.

Beginning on
App. Page No.

Orders of March 4, 1976 re:

- Defendant National Sugarbeet
Growers Federation's ()
Motion to Dismiss for lack of
Jurisdiction and Venue 607
- Defendants' Motion to Dismiss
for Failure to Answer or Timely
Answer Defendants' Class Action
Interrogatories 609
- Plaintiffs' Motion to Dismiss
Defendants' Counterclaims 611

Plaintiffs' Motion for Protective Order
dated September 24, 1975 612

Sugar Antitrust Litigation Hearing Trans-
cripts, for Hearings on:

- July 8, 1975..... 619
- December 9, 1975 723
- December 10, 1975 887
- August 16 and 17, 1976 926

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master File

No. MDL-201

MOTION TO DISQUALIFY
THE HONORABLE GEORGE H. BOLDT

(Names and Addresses of Counsel
appear on Signature Page)

United States District Court for the
Northern District of California

IN RE SUGAR ANTITRUST LITIGATION) Master File
)
) No. MDL-201

THIS DOCUMENT RELATES TO: ALL ACTIONS

MOTION TO DISQUALIFY
THE HONORABLE GEORGE H. BOLDT

The undersigned defendants hereby move, pursuant to 28
U.S.C. §§ 455(a), 455(b)(1), and 144 that the Honorable George H.
Boldt disqualify himself from further participation in these pro-
ceedings. This motion is grounded upon a record in these proceed-
ings of actual and apparent impropriety on the basis of which the
Court's impartiality might reasonably be questioned and on which
its impartiality is in fact questioned by defendants, so as to
require disqualification under 28 U.S.C. § 455(a). Moreover, as
affirmed under oath in the accompanying affidavits, the under-
signed defendants are convinced that the Court has manifested
personal bias and prejudice against them and in favor of plaintiffs,
requiring the Court's disqualification under 28 U.S.C. §§ 144 and
455(b)(1). The facts supporting this motion are set forth in the
accompanying affidavits, and a full statement of the grounds and

///

supporting authorities for the motion are set forth in the accom-
panying Memorandum of Points and Authorities.

Dated: October 18, 1976.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION)

Master File

THIS DOCUMENT RELATES TO:)

No. MDL-201

ALL ACTIONS)

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF MOTION TO

DISQUALIFY THE HONORABLE GEORGE H. BOLDT

1	<u>TABLE OF CONTENTS</u>	
2		<u>Page</u>
3	I. STATUTES INVOLVED	2
4	II. STATEMENT OF FACTS	3
5	A. Appointment of William H. Ferguson	
6	to Head Plaintiffs' Steering Committee	4
7	1. Mr. Ferguson's Views on	
8	Consolidation of the <u>1812</u>	
9	Case With the Other Consolidated	
10	Cases	5
11	2. Ex Parte Communications Re	
12	Consolidation of the <u>1812</u> Case	8
13	3. Ex Parte Contact at the Fairmont	
14	Hotel	9
15	B. Ex Parte Communication With Respect	
16	to Scheduling of Pretrial Conference	
17	and Class Action Hearing	12
18	C. Ex Parte Communications and Related	
19	Developments Concerning the Settlements	14
20	1. Ex Parte Communication re	
21	Settlement	15
22	2. The Settlement Agreements	18
23	D. Misstatements of Fact by the Court	25
24	1. The Court's Pretrial Order of	
25	August 25, 1976	26
26	2. Statements in the <u>Fertilizer</u>	
27	Cases Hearing	28
28	E. Summary	31
29	III. ARGUMENT	32
30	A. Introduction	34
31	B. Section 455(a) of Title 28 Compels	
32	Disqualification	35

1	C. Disqualification Is Also Required	
2	Under 28 U.S.C. § 144 and § 455(b)(1)	42
3	1. The Affidavits Are Timely	44
4	2. The Affidavits of the Parties	
5	Are Sufficient To Indicate the	
6	Court's Personal Bias	46
7	IV. CONCLUSION	52
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1	<u>TABLE OF AUTHORITIES</u>	
2		<u>Page(s)</u>
3	Berger v. United States, 255 U.S. 22	46, 47
4	Bradley v. School Board of City of Richmond, Virginia, 324 F.Supp. 439	44
5	Craven v. United States, 22 F.2d 605, certiorari denied 276 U.S. 627	48
6	Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044	46
7	Edwards v. United States, 334 F.2d 360	37
8	Nations v. United States, 14 F.2d 507, certiorari denied 273 U.S. 735	49
10	Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98	46
11	Pfizer Inc. v. Lord, 456 F.2d 532	46
12	Public Utilities Comm'n. v. Pollak, 343 U.S. 451 . .	38
13	Schmidt v. United States, 115 F.2d 394	49
14	United States v. Grinnell Corp., 384 U.S. 563 . . .	48
15	United States v. Ritter, 45 L.W. 2065	39, 40, 51
16	United States v. Sciuto, 531 F.2d 842	48
17	United States v. Townsend, 478 F.2d 1072	46
18	United States v. Zarowitz, 326 F.Supp. 90	38, 39
19	Ward v. Village of Monroeville, 409 U.S. 57	34
20	Whitaker v. McLean, 118 F.2d 596	42
20	Wolfson v. Palmieri, 396 F.2d 121	50
21		
22	<u>CODES AND STATUTES</u>	
23	Code of Judicial Ethics	
24	Canon 2B	51
25	Canon 3A(4)	11, 49
26	Canon 3C	36, 38, 43
26	28 U.S.C., § 144	1, 2, 34, 35,
27		42-47, 49, 52
28		

1	28 U.S.C., § 455	35-38, 43, 52
2	28 U.S.C., § 455(a)	1, 2, 12, 35,
3		36, 38, 39, 40,
4		42, 43, 45, 52
4	28 U.S.C., § 455(b)(1)	1, 2, 3, 42,
5		43, 47, 52
6		
7	<u>OTHER AUTHORITIES</u>	
8	Disqualification of Judges for Bias in the Federal Courts, 79 Harv.L.Rev. 1435	44, 47
9	H.R. Rep. No. 93-1453, 92d Cong., 2d Sess., 3 U.S.C. Cong. & Adm. News 6351	37, 38
10	Manual for Complex Litigation (West.Ed. 1973), ¶ 1.46	21
11		
12	S.Rep. No. 93-419, 93d Cong., 1st Sess.	37
13	Thode, Reporter's Notes to Code of Judicial Conduct (1973)	38
14	13 Wright, Miller & Cooper, Federal Practice and Procedure, § 3549	37, 44, 48, 50
15		
16		
17		
18		
19		
20		
21		
22		
23		
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25		
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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IN RE SUGAR ANTITRUST LITIGATION)
_____)
THIS DOCUMENT RELATES TO:)
_____) MASTER FILE NO. MDL-201
ALL ACTIONS)
_____)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO
DISQUALIFY THE HONORABLE GEORGE H. BOLDT

The undersigned defendants ("defendants") have moved pursuant to 28 U.S.C. §§ 144, 455(a) and 455(b)(1), to disqualify the Honorable George H. Boldt from further participation in the pending Sugar Antitrust Litigation for the following reasons:

(1) The Court's conduct throughout the course of these proceedings to date, including particularly its participation in a series of ex parte communications with Mr. William H. Ferguson, Chairman of Plaintiffs' Steering Committee, has produced a record on the basis of which the Court's impartiality might reasonably be questioned and on which its impartiality is in fact questioned by defendants, so as to require disqualification under 28 U.S.C. § 455(a).

(2) As affirmed under oath in the accompanying affidavits, defendants are convinced that the Court has manifested personal bias and prejudice against them and in favor of plaintiffs, so as to require the Court's disqualification under 28 U.S.C. §§ 144 and 455(b)(1).

This memorandum is submitted in support of that Motion.

I. STATUTES INVOLVED

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The statutory provisions upon which this Motion is premised are as follows:

28 U.S.C. § 455(a) provides:

"Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 144 provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

28 U.S.C. § 455(b)(1) provides:

"He [any judge] shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
..."

II. STATEMENT OF FACTS

A steady and increasingly serious accumulation of incidents occurring over the course of these proceedings, crystallizing in two recent developments, has convinced defendants that they cannot receive justice in this Court. The two recent developments which compelled the filing of this motion are: (1) this Court's misstatement in Pretrial Order No. 12, dated August 25, 1976, repeated on the record in a hearing in the Northwest Fertilizer Cases, concerning the extent of its knowledge of the terms of certain previously negotiated settlements, which confirmed defendants' concern that such knowledge, now categorically denied by the Court, had improperly influenced the Court's decision on a litigated issue; and (2) the disclosure by the Court, on September 9, 1976, on the record of the hearing in the Northwest Fertilizer Cases, that there had been an ex parte communication between the Court and the Chairman of the Plaintiffs' Steering Committee concerning advancement of the aforementioned settlements, which confirmed the concern of the moving parties that this Court had been influenced by such ex parte communications to the point that it could not render its decisions free of bias and prejudice.

To appreciate fully the cumulative impact of these recent developments requires examination of a detailed chronology of

prior events. Taken as a whole, those events demonstrate (1) that this Court has conducted these proceedings and rendered its decisions without regard to the facts and the applicable law, and with the single overriding objective of pressuring defendants into unwarranted settlements; and (2) that defendants have heretofore been deprived of a fair and impartial tribunal and will continue to be deprived of such a tribunal in the future unless this Court disqualifies itself from further participation in these proceedings.

A. Appointment of William H. Ferguson To Head Plaintiffs' Steering Committee

The selection of Mr. William Ferguson, a close personal friend of the Court, as Chairman of the Plaintiffs' Steering Committee -- which selection was preceded by ex parte communications between Mr. Ferguson and the Court -- set the stage for what has apparently become a continuing abuse of the relationship between Mr. Ferguson and the Court, with the result that the Court has consistently exhibited bias and prejudice in favor of those plaintiffs whom Mr. Ferguson represents or on whose behalf Mr. Ferguson, as Chairman of Plaintiffs' Steering Committee, purports to speak. While defendants do not contend that personal friendship between a judge and an attorney practicing before his court, standing alone, is a basis for the court's disqualification, Mr. Ferguson's role in this litigation, and his influence on the Court, must be viewed in the context of his long-standing personal relationship with the Court.

1 1. Mr. Ferguson's Views on Consoli-
2 dation of the 1812 Case With the
3 Other Consolidated Cases

4 Mr. Ferguson became involved in the Sugar Antitrust
5 Litigation in the following manner. On October 4, 1972, he
6 filed an action in the Western District of Washington on behalf
7 of twelve food and beverage manufacturers charging two sugar
8 processors with antitrust violations arising principally from
9 the purported use by defendants of a "basing point pricing
10 system" on sales of refined sugar in the five so-called "Inter-
11 mountain-Northwest" states. 1812 Distributing Corp., et al.
12 v. Utah-Idaho Sugar Company, et al., No. 633-72C2 (W.D. Wash.)
13 ("the 1812 case").

14 More than two years later, on December 19, 1974, five
15 government actions -- two criminal and three civil -- were filed
16 in the United States District Court for the Northern District
17 of California against certain sugar companies alleging price-
18 fixing conspiracies in three geographic areas encompassing twenty-
19 three states. None of the government cases challenged the
20 "basing point pricing system" which purported to form the basis
21 of the 1812 case. Within a day of the filing of the government
22 cases, the first of the private treble damage class actions
23 purporting to be based on the government proceedings was filed;
24 scores of other actions followed.

25 In early 1975, various motions were made before the
26 Judicial Panel on Multidistrict Litigation to consolidate the
27 various sugar cases pending in a number of different judicial
28

1 districts. A number of parties urged that the cases be
2 consolidated in the Northern District of California, where the
3 five government actions had been filed.

4 During the original Panel proceedings, Mr. Ferguson
5 took no position on the record as to whether or not 1812 should
6 be transferred and consolidated with those actions which were
7 based on the government cases. On June 2, 1975, the Panel
8 consolidated all of the pending sugar cases which were subject
9 to its Order to Show Cause in the Northern District of California
10 and assigned them to this Court. In Re Sugar Industry Antitrust
11 Litigation, 395 F. Supp. 1271 (J.P.M.L. 1975). Subsequent to
12 the Panel's decision, counsel for defendants in 1812 were advised
13 by Mr. Ferguson that he opposed transferring the 1812 action
14 to the Northern District of California and consolidating it
15 with the other actions which had been consolidated there by
16 the Panel because it would retard the trial of the 1812 action
17 and, consequently, Mr. Ferguson believed that such transfer
18 and consolidation would be "prejudicial to his clients'
19 interests."^{1/} (Affidavit of Marc P. Fairman, ¶ 5.)
20

21 Following the Panel's decision, this Court scheduled
22 a first pretrial conference to be held in San Francisco on July
23

24 ^{1/} Other Northwest plaintiffs, represented by counsel who had
25 worked closely with Mr. Ferguson, acknowledged before the Panel
26 that their cases were patterned after 1812, and urged that those
27 cases not be transferred. They, too, were apparently under
28 the impression that Mr. Ferguson opposed transfer of 1812.
See Opposition of State of Washington (J.P.M.L., dated March
5, 1975); Opposition of Washington Beverage Co., Inc., et al.
(J.P.M.L., dated March 10, 1975).

1 8, 1975. On the evening of July 7, Mr. Robert D. Raven and
2 Mr. Peter Byrnes, counsel of record for Amstar Corporation,
3 met with Mr. Ferguson in the Fairmont Hotel. ^{2/} Mr. Ferguson
4 advised Messrs. Raven and Byrnes that he now favored
5 consolidation of the 1812 case, because "they have made
6 me an offer I can't refuse" (Affidavit of James F. Kirkham,
7 ¶ 5).

8
9 Thus, Mr. Ferguson was apparently persuaded by counsel
10 for the class action plaintiffs to support consolidation of
11 the 1812 case so that that case would be transferred to the
12 Northern District of California -- notwithstanding the adverse
13 impact that transfer might have on the progress of that case,
14 which had been on file for over two years. It is hard to imagine
15 what motive counsel for the class action plaintiffs, whose ranks
16 included the most experienced plaintiffs' class action antitrust
17 lawyers in the country, would have had for making this "offer"
18 to Mr. Ferguson (who did not even purport to represent a class
19 and whose case, unlike theirs, was not patterned on the
20 government actions) except by reference to some special advantage
21 plaintiffs' counsel believed they could obtain through Mr.
22 Ferguson's participation in the proceedings before this Court.
23

24 ^{2/} Before the Judicial Panel, Amstar had opposed consolidation
25 of the Northwest-based cases with the other sugar cases filed
26 in the Northern District of California. Counsel for Amstar
27 thus wished to ascertain what position Mr. Ferguson would take
28 with respect to consolidation of the 1812 action in that the
Panel had previously ordered transfer of the other Northwest-
based cases to San Francisco. (Kirkham Affidavit, ¶ 5.)

1 The advantage which plaintiffs sought, and ultimately obtained,
2 has become increasingly obvious from what has followed.

3
4 2. Ex Parte Communications Re
5 Consolidation of the 1812 Case

6 During the period in which Mr. Ferguson was apparently
7 revising his views on consolidation of the 1812 case, the first
8 ex parte contact of which defendants are aware took place between
9 the Court and Mr. Ferguson. In the same conversation in which
10 Mr. Ferguson had told Messrs. Raven and Byrnes of his "offer"
11 from plaintiffs, he also disclosed that "the Judge wants the
12 1812 case consolidated." (Kirkham Affidavit, ¶ 5.)

13 Counsel for defendants were not present when Mr. Ferguson
14 was advised that the Court wanted the 1812 case consolidated,
15 and at this point can only speculate: how information with
16 respect to the Court's views was communicated to Mr. Ferguson;
17 why the Court decided that he wanted the 1812 case consolidated;
18 how this conversation with the Court might have influenced Mr.
19 Ferguson's decision to support consolidation and, ultimately,
20 to become Chairman of the Plaintiffs' Steering Committee;^{3/}
21 or, conversely, how Mr. Ferguson's decision to support
22 consolidation and to head Plaintiffs' Steering Committee might
23 have influenced the Court's decision with respect to
24 consolidation of 1812. It suffices to say that one of the chief
25 evils of ex parte communications, direct or indirect, with a
26 presiding Judge is that the excluded parties have neither

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28 ^{3/} See pp. 9-11, infra.

1 knowledge of what is said in such communications, nor an
2 opportunity to respond with respect thereto.

3 For a federal district judge to participate in one such
4 communication places his impartiality in question. As will
5 be shown below, a number of such communications have taken place,
6 and it is now apparent that such communications have influenced
7 the determination of litigated issues, such as the Court's class
8 action order, which was tailored to settlements discussed by
9 Mr. Ferguson and the Court. (See pp. 15 - 17, infra.)

10 On the day following Mr. Ferguson's disclosure to Messrs.
11 Raven and Byrnes that the Court wished to have the 1812
12 case consolidated, the Court informed the parties that the
13 Judicial Panel had left the handling of the 1812 case "to
14 [his] discretion" and, as almost the first order of business,
15 the Court consolidated that action with the other sugar cases.
16 (July 8, 1975 Hearing, Tr. 13-14).
17

18 3. Ex Parte Contact at the Fairmont Hotel
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20 The Court's ex parte contacts with Mr. Ferguson continued
21 at the latter's suite at the Fairmont Hotel on July 24, 1975.
22 The background to this contact is as follows.

23 At the commencement of Pretrial Conference No. 1, which
24 took place on July 8, 1975, Mr. Ferguson introduced himself
25 as "ad hoc chairman of the plaintiffs' steering committee" (Tr.
26 4). Nothing further was said on the record of Pretrial
27 Conference No. 1 concerning Mr. Ferguson's status in the
28 consolidated proceedings.

1 During this pretrial conference, the parties were ordered
2 by the Court to confer and to attempt to agree upon the terms
3 of Pretrial Order No. 1, on which the Court had ruled during the
4 course of the hearing. In accordance with the Court's directive,
5 counsel for the parties met following the conference to draft
6 Pretrial Order No. 1 and reached agreement on the form of that
7 Order. On July 24, 1975, Mr. Stephen V. Bomse, then liaison
8 counsel for defendants, was asked by Mr. Ferguson, who was in
9 San Francisco to attend the Ninth Circuit Judicial Conference,
10 to meet at the Fairmont Hotel (where Mr. Ferguson was staying)
11 with Judge Boldt and Mr. Josef Cooper, liaison counsel for
12 plaintiffs, for the purpose of having Pretrial Order No. 1
13 signed. (Kirkham Affidavit, ¶ 3.)

14 Mr. Bomse went to Mr. Ferguson's hotel room and found
15 Judge Boldt with Mr. Ferguson. The Court had already signed
16 Pretrial Order No. 1, which included Part XIII concerning the
17 parties' steering committees. No attorney had been designated
18 as Chairman of Plaintiffs' Steering Committee on the form of
19 order agreed to by the parties and submitted to the Court.
20 However, when Mr. Bomse arrived at the meeting, Judge Boldt advised
21 him that it was necessary to have a Chairman of each Steering
22 Committee and that Mr. Ferguson would be Chairman of Plaintiffs'
23 Steering Committee. Thereafter, the Order already having been
24 signed and Mr. Ferguson designated as Chairman of Plaintiffs'
25 Steering Committee, Mr. Cooper arrived at the hotel room.

26 Mr. Bomse assumed at the time that plaintiffs' counsel
27 had agreed among themselves that Mr. Ferguson would be the
28

1 Chairman of Plaintiffs' Steering Committee. Later that day,
2 however, Mr. Cooper inquired of Mr. Bomse as to the circumstances
3 under which Mr. Ferguson had been designated by Judge Boldt
4 as Chairman, inasmuch as this had not been expressly agreed
5 upon by plaintiffs' counsel. (Kirkham Affidavit, ¶ 4.)
6 It thus appears that Mr. Ferguson was selected as head of
7 Plaintiffs' Steering Committee by the Court prior to Mr.
8 Bomse's arrival at the hotel room, or at some previous ex parte
9 meeting with the Court.

10
11 The foregoing conduct raises at the very least an
12 appearance of impropriety for two reasons. First, ex parte
13 communications between counsel and the Court concerning a pending
14 proceeding are prohibited by Canon 3A(4) of the Code of Judicial
15 Ethics. (See pp. 49-50, infra.) Second, one might reasonably
16 conclude on the basis of these facts that the Court had allowed
17 his personal relationship with Mr. Ferguson to influence his
18 judicial conduct, had lent the prestige of his office to advance
19 the private interests of Mr. Ferguson, or had conveyed or permitted
20 Mr. Ferguson to convey the impression that Mr. Ferguson was in a
21 special position to influence him, in violation of Canon 2B
22 of the Code of Judicial Ethics. (See p. 51, infra.)

23 * * *

24
25 The circumstances surrounding Mr. Ferguson's selection
26 as Chairman of Plaintiffs' Steering Committee, including
27 ex parte communications with the Court, presented defendants
28 with a deeply troublesome situation, but not one

1 which, in their view at the time, justified the drastic step
2 of moving to disqualify the Court. Events which have transpired
3 since that time, however, including the occurrence of additional
4 ex parte communications which appear to have influenced the
5 Court's disposition of significant litigated matters, have amply
6 confirmed that defendants' initial concerns were fully justified.

7
8 B. Ex Parte Communication With Respect
9 to Scheduling of Pretrial Conference
10 and Class Action Hearing

11 The pattern of ex parte communications between the Court
12 and Mr. Ferguson which was established at the commencement of
13 consolidated pretrial proceedings has continued and, at the
14 very least, appears to have undermined the Court's impartiality
15 by influencing the determination of litigated issues, so as
16 to require disqualification under 28 U.S.C. § 455(a).

17 The next such communication of which defendants are
18 aware took place on August 18, 1975. Counsel for plaintiffs
19 and defendants had previously conferred and agreed to the wording
20 of Pretrial Order No. 2. Mr. Ferguson was to file it with the
21 Court on behalf of plaintiffs and defendants. Instead of merely
22 filing the document with the Clerk of the Court, as would have
23 been appropriate, Mr. Ferguson delivered it personally to the
24 Court and discussed with the Court issues of critical importance
25 to defendants. No representative of defendants was present.^{4/}

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27 ^{4/} Mr. Ferguson's account of this conference is given in a
28 letter to Mr. Lawrence Keeshan, dated August 18, 1975 (attached
hereto as Exhibit A).

1 It is clear from what subsequently transpired that Mr.
2 Ferguson and the Court discussed the establishment of a pretrial
3 schedule leading to discovery on the class action issue. Indeed,
4 agreement appears to have been reached between the Court and
5 Mr. Ferguson with respect to scheduling matters at that time.
6 In plaintiffs' subsequent Motion for a Protective Order, dated
7 September 24, 1975, plaintiffs asserted:

8
9 "The pretrial schedule leading to
10 discovery was reaffirmed by this Court
11 on August 18, 1975 at the second
12 Pretrial Conference." (Emphasis added.)

13 The "second Pretrial Conference" referred to by plaintiffs was
14 none other than the ex parte conference between the Court and
15 Mr. Ferguson which took place on August 18, 1975!

16 Defendants registered their strong objection to this
17 ex parte communication at the time. In a letter to Mr. Ferguson
18 dated August 21, 1975 (attached hereto as Exhibit B) Stephen
19 V. Bomse, who was then defendants' liaison counsel, stated:

20 "Finally, the concerns expressed
21 above apply with far greater force
22 to ex parte communications, such as
23 apparently occurred between you and
24 Judge Boldt on Monday.

25 * * *

26 "From your letter, it appears
27 that not only did you appear ex parte,
28 but that you discussed with the Judge
future scheduling of events in the
case. We do not approve of that
practice and certainly hope that it
will not be repeated.

1 "We do not know and, thus, cannot
2 comment upon the prevailing practice
3 in your district. However, in the
4 Northern District of California (to
5 which these cases have been assigned
6 and by whose rules they are governed),
7 no lawyer would be permitted to
8 communicate directly with the Court
9 about pending litigation in the absence
10 of opposing counsel. * * * [W]e wish
11 to make it clear that defendants
12 expressly object to any such ex parte
13 communications in the future whether
14 by you or by any other lawyer in these
15 cases." (Exhibit B, p. 2.)

16 The schedule for class action discovery and briefing
17 of the class action issue, which Mr. Ferguson discussed with
18 the Court on this occasion, was being strenuously contested
19 at the time. As events transpired, the Court, on September
20 26, 1975, ruled favorably to plaintiffs on the very subjects
21 which had been discussed by the Court and Mr. Ferguson at the
22 ex parte conference of August 18, 1975.

23 C. Ex Parte Communications and Related
24 Developments Concerning the Settlements

25 This distressing pattern of ex parte communications
26 between Mr. Ferguson and the Court continued in connection with
27 certain settlements negotiated between Mr. Ferguson's Steering
28 Committee and certain of the defendants (Holly, C&H, and Union),
and has prejudiced defendants by influencing the Court's ruling
on class action issues -- issues which are of critical importance
to defendants in this litigation.

1. Ex Parte Communication re Settlement

Prior to the Court's ruling on class certification, defendants Holly, C&H, and Union separately negotiated conditional settlement agreements, purportedly approved by a majority of Plaintiffs' Steering Committee. The Holly and C&H settlements, in the sums of \$5,000,000 and \$16,500,000, respectively, were the first to be agreed upon.

Shortly after tentative agreement had been reached with Holly (and perhaps C&H) in late October or November, 1975, Mr. Ferguson telephoned the Court ex parte to inform him of the settlements and to discuss with the Court "whatever might be appropriate to move forward to some action on those proposed settlements." (See transcript of Northwest Fertilizer Cases hearing, quoted at p. 16, infra.) This conversation is particularly shocking in light of the fact that the single act by the Court most necessary to "move forward to some action" on the proposed settlements was its disposition of the class certification motions in a way which conformed to the terms of these settlements, inasmuch as the viability of these settlements depended upon such action by the Court. (See pp. 18 - 21, infra).

Although defendants became aware at some point subsequent to the ex parte call that Mr. Ferguson had placed such a call to the Court with respect to the fact and the amount of

1 settlement(s),^{5/} it was not until the Court himself discussed the 'issue on the record in the Northwest Fertilizer Cases litigation (W.D.Wash., Master File No. MF-75-1) on September 9, 1976, that defendants became aware that Mr. Ferguson had discussed the processing of these settlements with the Court.^{6/} Because of the close relationship between the terms of the settlements and the resolution of the class certification issue, discussed below, an ex parte communication between the Court and counsel for plaintiffs on this subject was highly improper.

What the Court disclosed on the record at the Fertilizer hearing is as follows:

"The first I heard of the proposed settlements is when Mr. Ferguson telephoned me and said that some proposed settlements had been negotiated with three defendants, I believe, and that he wanted to do whatever might be appropriate to move forward to some action on those proposed settlements. I said to him that, of course, I did not want to have any information from him or anyone else concerning the details of the negotiations, but that I thought that he might appropriately

^{5/} Liaison counsel for defendants had been told by Mr. Ferguson that he had placed a call to the Court earlier to disclose the fact and the amount of the settlement(s). Mr. Ferguson did not disclose that he had also discussed with the Court his desire "to do whatever might be appropriate to move forward to some action on those proposed settlements."

^{6/} Issues relating to the propriety of the Court's conduct in the Sugar Antitrust Litigation had been raised in connection with a motion to disqualify filed in the Northwest Fertilizer Cases (the transcript of the hearing in that proceeding is Exhibit C hereto). It was with reference to these issues that the Court had occasion to comment upon the sugar litigation in the course of an entirely different set of judicial proceedings. The Court denied the motion to disqualify in those proceedings, but nevertheless transferred the cases back to the Chief Judge of the District.

1 lodge the material under seal with
2 the Clerk." (Hearing of September
3 9, 1976, p. 45; a copy of the trans-
4 script is Exhibit C hereto.)^{7/}

5 Again, defendants have no way of knowing exactly what was said
6 between the Court and Mr. Ferguson. As noted above, therein
7 lies the very vice inherent in ex parte communications. The
8 fact that this conversation occurred at all, relating as it
9 did to a subject of such considerable sensitivity, and in light
10 of Mr. Bomse's previous request that such communications cease,
11 is inexcusable.

12 Despite the fact that both Mr. Ferguson and the Court
13 purported to describe their conduct with regard to the tentative
14 settlements on the record at the December 10, 1975 hearing in
15 these proceedings, neither mentioned the telephone call from
16 Mr. Ferguson to the Court described above. (December 10, 1975
17 Hearing, Tr. 171-77, 198-200.) In fact, in contrast to its
18 statement on the record in the Northwest Fertilizer hearing,
19 the Court at the December 10, 1975 hearing stated that nothing
20 had been told to him concerning the settlements except the amount
(Tr. 182).

21 Finally, yet another incident illustrates the insensitiv-
22 ity of the Court, Mr. Ferguson and Plaintiffs' Steering Committee
23 to the prohibition against ex parte contacts. Coordinating
24

25 ^{7/} In fact, the material was never lodged under seal with the
26 Clerk as the Court says it recommended. Rather, on December
27 5, 1975, Mr. Ferguson, as Chairman of Plaintiffs' Steering
28 Committee, filed with the Court a document entitled "Request
for Establishment of Schedule for Consideration of Proposed
Settlements, to which the agreement with Holly was attached
in full as an exhibit. This document was not filed under seal.
(See p. 30, supra.)

1 counsel for defendants have learned that an in-chambers conference
2 had at one point been scheduled with the Court for December 5,
3 1975 (after Mr. Ferguson's earlier telephone conversation with
4 the Court), apparently to be attended only by counsel for the
5 "settling" defendants and plaintiffs' coordinating counsel,
6 ostensibly for purposes of advising the Court of the terms of the
7 proposed settlements and of making arrangements for the Court to
8 "tentatively approve" the settlements. (Affidavit of Robert D.
9 Raven, ¶ 10.) Coordinating counsel for defendants further
10 learned that the conference had subsequently been cancelled
11 at the instance of one of plaintiffs' counsel who raised
12 questions concerning the propriety of such a conference.
13 (Raven Affidavit, ¶ 10.) That Mr. Ferguson would have
14 proposed such a conference, or that the Court would
15 apparently have consented to meet in chambers with counsel for
16 the parties to the purported settlements without notifying the
17 other parties to the litigation, raises serious questions of
18 impropriety in light of the previous pattern of ex parte contacts
19 and the relationship between the settlement agreements and the
20 pending class certification motions.

21 2. The Settlement Agreements

22 As the Holly settlement filed with the Court
23 in early December disclosed, both that agreement and the other
24 two subsequently executed settlement agreements were conditioned
25 upon (1) the Court's certifying the broad classes sought by
26 those members of the Steering Committee who had approved the
27

1 settlement (the "Ferguson group"), which certification would
2 achieve maximum res judicata effect for the settling defendants,
3 and (2) the Court's refusal to certify certain consumer classes
4 sought by various states.

5
6 The conditional nature of the settlements and their
7 potential impact on the Court's pending class certification
8 decision were called to the Court's attention in a letter dated
9 November 26, 1975, from William J. Scott, Attorney General of
10 Illinois, and Lee. A. Freeman, a Chicago lawyer who, along with
11 the Attorney General, represents the State of Illinois in this
12 litigation. Previously, Messrs. Scott and Freeman had moved
13 the Court to certify a class of all consumers ("household units")
14 in the State of Illinois. Other groups of plaintiffs had moved
15 the Court to certify various additional classes. Defendants
16 were opposing certification of any classes, and no decision
17 had yet been rendered by the Court on these issues.

18 By their letter of November 26, 1975, Messrs. Scott
19 and Freeman informed the Court, among other things, as follows
20 (the full text of the letter is attached as Exhibit D hereto):

21 "[T]he Executive Committee [of
22 plaintiffs' counsel] negotiated a
23 settlement with Holly Sugar for \$5
24 million * * *. We do not at this time
25 quarrel with the adequacy and
26 reasonableness of the amount of the
27 Holly settlement, * * * but we do
28 strenuously object to the form and
conditions of that settlement since
it deliberately seeks to prejudice
the position of state attorneys general
who * * * seek certification of consumer
classes.

1
2 "The Holly settlement provides
3 for the establishment for settlement
4 purposes only of four classes in each
5 of the three markets covering the
6 periods from 1949 or 1955 to date,
7 as follows:

8 "1. Industrial users broadly
9 defined as anyone who directly
10 or indirectly purchased refined
11 sugar for use or manufacture by
12 restaurants, hospitals, vending
13 machine operators and manufacturers
14 of ice-cream, dairy products,
15 beverages, wines, beer,
16 confectionary, canned, bottled
17 and frozen foods, baker goods,
18 cereal, animal feed, etc., etc.

19 "2. Retail grocers who
20 directly or indirectly purchased
21 refined sugar and had gross annual
22 sales of \$150,000 or more.

23 "3. Governmental entities.

24 "4. Wholesalers who directly
25 or indirectly purchased refined
26 sugar for resale.

27 "Specifically and deliberately
28 excluded from any class specification
are consumers. The Holly settlement
is conditioned to provide that either
party may withdraw from the agreement
if a consumer class is certified for
litigation purposes and Holly may
withdraw if the Court should certify
settlement classes which are narrower
than those defined.

"The Holly settlement thus preempts
the Court's function of defining and
certifying classes on the basis of
the submission of proper data. It
serves to grossly prejudice the position
of the proposed consumer classes by
imposing improper pressures on the
Court to reject that class and give
priority recognition to the wholesaler
and retail grocers classes as a means
of preserving the settlement.

* * *

"The situation has developed further. Two additional settlements have been tentatively approved by some members of the Executive Committee and recommended for approval by the Steering Committee and ultimately the Court. These two settlements are to include the same improper provisions and conditions usurping judicial class action determinations and excluding consumers.

* * *

"We are concerned that continuation of negotiations (a) prior to judicial certification of classes (b) involving the attempted establishment of classes for settlement purposes only (c) seeking preferential position for classes who may not possess a legal basis of participation and (d) excluding a class entirely -- is improper and contrary to announced judicial decisions and the strong suggestions contained in the Manual for Complex Litigation, Section 1.46 -- with which this Court is intimately familiar."

On the morning of December 9, 1975, prior to the scheduled oral argument on the class motions, at a conference in chambers attended by liaison counsel for plaintiffs and defendants, the Court had in hand this letter (hereinafter called the "Freeman letter") (Raven Affidavit, ¶ 7; Kirkham Affidavit, ¶ 6). The Court acknowledged that he had received the letter (ibid.). The Court said words to the effect that it had not answered the letter and did not intend to answer it, since in view of the contents all the Court could possibly say under the circumstances was, "Your letter of so and so date received", and the Court would not want to give such a curt reply to an old friend like Mr. Freeman (ibid.). There followed

a lengthy colloquy between Mr. Ferguson, Mr. Harold Kohn (an attorney for the "Ferguson group"), and the Court with respect to the propriety of certifying consumer classes, which issue was at the heart of the problem raised in the Freeman letter. (Ibid.)

From the Court's initial comments about the style and the subject matter of the Freeman letter, and from Mr. Kohn's in-chambers argument relating to Mr. Freeman's objections to the settlements which followed, it was clear that Judge Boldt had read the letter with sufficient care to understand its contents as well as its tone, and that the Court was aware of the key contingencies in the settlements (ibid.). When counsel for defendants expressed at the hearing which followed the in-chambers discussion noted above the view that the Court's ability to rule fairly and impartially on the class certification motions had been undermined by knowledge of the terms of the settlements. the Court acknowledged having read the Freeman letter:

"MR. KIRKHAM: Your Honor, may I just to clear the record, as we understand it in any event, the letter addressed to you by Mr. Freeman, which I know you will have read out of courtesy to Mr. Freeman, it says -

"THE COURT: This is somewhat analogous to the business of ruling on the objections to evidence in a non-jury case. You have to read the exhibit to decide whether you should read it."

"MR. KIRKHAM: Certainly, of course, Your Honor. And that does set out -- I was concerned with your statement in conveying any information to the Court. We think it is the plaintiffs that have done so, and it

1 does on Page 2 of that letter set out
2 that the Holly -- I read, now,

3 'The Holly settlement provides
4 for establishment for purposes
5 of four classes . . ."

6 Spells them out,

7 ". . . deliberately excluded
8 are consumers."

9 And I think in fairness to the
10 record that it is a letter, say, a
11 six page letter.

12 "THE COURT: I must have noticed
13 that, but frankly, I skimmed it so
14 quickly I couldn't be responsible for
15 remembering anything that was in it
16 excepting that there was a proposed
17 settlement.

18 "MR. KIRKHAM: Your Honor, our
19 concern, of course, is as is
20 appropriate, goes to appearances as
21 well as facts. . . ." (December 10,
22 1975 Hearing, Tr. 184-85) (emphasis
23 added).

24 Irrespective of whether or not the Court read the Freeman
25 letter, or the Holly agreement, word-for-word, it was thus aware
26 of the significant terms of the settlements, as disclosed in
27 the Freeman letter, by the close of the hearing of December
28 9 and 10, 1975. In addition to what the Court learned in the
conference in chambers before the hearing, there were comments
on the record of that hearing by Mr. Freeman, Mr. Kohn, and
other members of the Steering Committee (including some who
vigorously dissented from the settlements on the grounds that
they disadvantaged certain of the proposed classes) prompted
by the problems posed for certain plaintiffs by the settlements,
especially as the settlements might impact upon the request

1 for certification of consumer classes. (December 9, 1975
2 Hearing, Tr. at 68-81, 86-89; December 10, 1975 Hearing, Tr.
3 177-85, 188-200.) These arguments in general, and Mr. Kohn's
4 arguments in particular (Tr. 68-81), are intelligible only in
5 light of the provisions of the settlements, especially those
6 provisions which excluded consumer classes. In short, defendants
7 had no doubt at the time, and have no doubt today, that the
8 Court recognized the effect of certification of certain
9 industrial, retail grocer, governmental entity and wholesaler
10 classes, and non-certification of consumer classes, upon the
11 proposed settlements as of December 9 and 10, 1975.^{8/}

12 On May 20, 1976, the Court issued its Order and Opinion
13 re Class Actions. This decision conformed in all relevant
14 respects to the conditions set forth in the settlement agreements
15 for the consummation of those agreements:

16 -- First, the Court certified broad
17 classes of industrial sugar users,
18 retail grocers, governmental
19 entities, and non-industrial
20 wholesalers. (Order, pp. 43-45.)

21
22
23 ^{8/} Defendants' concern with respect to the compromising position
24 in which the Judge had been placed by the filing of the Holly
25 settlement and receipt of the Freeman letter was expressed to
26 the Court at a conference in chambers on December 22, 1975,
27 attended by liaison counsel for plaintiffs and defendants, at
28 which time defendants suggested that the Court confine its
further responsibilities to reviewing the fairness of the
proposed settlements, and making arrangements for the litigation
to be assigned to another judge for all other purposes. The
Court took defendants' suggestion under consideration, but has
to date not acted upon it. (Affidavit of John C. Reynolds, ¶ 8.)

-- Second, the Court denied certification to the consumer classes urged by Illinois and other states. (Order, pp. 23-25.)

Thus, the undersigned defendants' concern with respect to the Court's knowledge of the settlements (that the Court would ignore the facts and controlling law and certify the broad classes sought by plaintiffs and "settling" defendants), and Mr. Freeman's corresponding concern (that the Court would deny certification of the proposed consumer classes), were both realized in the Court's class certification decision.

D. Misstatements of Fact by the Court

As is clear from the above, defendants are convinced that the Court knew the significant conditions embodied in the three settlements through the Freeman letter, the colloquy among counsel in chambers on December 9, 1975, the hearing of December 9-10, 1975, and perhaps also through the ex parte communication with Mr. Ferguson of late October or November 1975. Recently, however, the Court has made statements, in a pretrial order in these cases and on the record in a hearing in another matter, designed to create the impression, which the undersigned believe to be contrary to fact, that he had no such knowledge whatsoever.

The issue is of particular sensitivity since defendants on two occasions had expressed their fears that the Court's knowledge of the conditional nature of the settlements would

influence its rulings on plaintiffs' motions to certify classes. (Tr. of Dec. 10, 1975 Hearing, pp. 177-183; Conference of December 22, 1975, discussed supra at p. 24, n. 8.) These statements by the Court appear to defendants to be an attempt to make a "record" that the Court was not influenced in its class certification rulings by any knowledge of the settlements. These statements, and the attitude they evidence, have convinced the undersigned that this Court was improperly influenced by knowledge of the settlements.

1. The Court's Pretrial Order of August 25, 1976

Subsequent to issuance of the Court's class action decision of May 20, 1976, which, as noted above, conformed to all conditions required to preserve the settlement agreements, an amended settlement agreement was negotiated between Plaintiffs' Steering Committee and the three settling defendants. At a hearing on August 17, 1976, over defendants' objection, the Court permitted that agreement to be lodged with the Court. Thereafter, counsel for the parties met to agree on a proposed form of order to reflect the Court's various rulings made at the August 17, 1976 hearing in which the Court, inter alia, tentatively approved the fairness of the amended settlement agreement and ruled that notice of it should be provided to class members. As a result of that conference, certain language was submitted to Judge Boldt by plaintiffs and defendants, relevant to the amended settlement agreement lodged with the Court on August 17. That proposed language provided, inter alia, that the Court "had not had an

1 opportunity to review such agreement," referring expressly to
2 the amended settlement agreement. Although this language clearly
3 referred to the amended settlement agreement filed on August 17,
4 1976, Mr. Robert Mallory, on behalf of all defendants, suggested a
5 modification in the proposed language designed to avoid any
6 misconception or mischaracterization of the events which had
7 occurred regarding the submission to the Court of the earlier
8 Holly settlement and its accompanying reference to similar settle-
9 ments with C&H and Union. In a letter dated August 23, 1976, Mr.
10 Mallory proposed that the order be rephrased to read: "the Court
11 had not previously had the opportunity to review that particular
12 form of agreement [i.e., the amended settlement agreement]."
13 (See Exhibit E hereto, p. 2; emphasis added).

14 The Court, however, rejected both the original language
15 and Mr. Mallory's proposed rephrasing and, in Pretrial Order No.
16 12, dated August 25, 1976, represented -- in flat contradiction
17 of the facts -- that:

18 "Prior thereto [August 17, 1976] the
19 Court had not learned the contents of the
20 settlement agreements in any manner whatsoever."
(Emphasis added.)

21 Irrespective of what the Court may have learned from
22 his ex parte telephone conversation with Mr. Ferguson, and
23 irrespective of whether the Court reviewed the Holly settlement
24 agreement when it was first filed with the Court, the Court
25 had been informed of the significant contents of the settlements
26 (e.g., that they were conditioned upon the certification of
27 broad industrial, retail grocer, governmental entity, and
28 wholesaler classes and upon non-certification of consumer
classes) by the Freeman letter, which was discussed in the
presence of counsel for defendants at a conference in chambers

1 before the December 9, 1975 hearing (see pp. 21-22, supra),
2 and at the hearing of December 10, 1975 (Tr. 178-85).
3

4 Having been advised that the Court now denies any
5 knowledge whatsoever of the terms of the proposed settlements,
6 defendants must infer that the Court was, indeed, influenced
7 by such knowledge, and that the untrue statement inserted in
8 his Order of August 25, 1976, was an attempt to create the
9 contrary impression on the record.

10 2. Statements in the Fertilizer
11 Cases Hearing

12 Following close upon the Court's statement in Pretrial
13 Order No. 12 that it had no knowledge of the settlements, was
14 a second and related series of statements by the Court during
15 the course of a hearing in the Northwest Fertilizer Cases which
16 further suggests that the Court was concerned with having created
17 an appearance of impropriety in connection with his treatment
18 of the settlements and the class action issue to the point of
19 making statements with respect thereto which are wholly contrary
20 to fact.

21
22 9/ After issuing its class action order which conformed to
23 the terms of the proposed settlements, the Court took other
24 opportunities to deny any knowledge of the settlements, but
25 until August 25, 1976, did not go so far as to deny such
26 knowledge in a written order. For example, at the August 16
27 and 17, 1976 hearing, the Court made numerous gratuitous and
28 incorrect statements such as, "I have not seen them [the
settlements] or heard anything about them" (Tr. 11; see also
Tr. 100, 101, 105, 106). These statements conflict with earlier
statements made by the Court. (Dec. 10, 1975 Hearing, Tr. at
178-85.) Compare also the transcript of the Northwest Fertilizer
Cases hearing of September 9, 1976, pp. 45-46, quoted infra,
pp. 29-30.

1 In a hearing on September 9, 1976 in the Northwest
2 Fertilizer cases, various defendants raised a question about
3 the Court's knowledge of the sugar settlements and its impact
4 on his class action order in the Sugar Antitrust Litigation.
5 The Court attempted to explain his conduct with regard to the
6 sugar settlements as follows:

7 "Does Mr. Raven include in his
8 affidavit my statement in open court
9 when the matter was first brought before
10 the Court that I had not read any of
11 the contents of those papers? I had
12 them sealed and lodged under seal,
13 and that I did not, in any way, read
14 or have anything to do with those
15 matters until they were opened in open
16 court? He makes no mention of that.
17 And he makes no mention in his affidavit
18 that I expressly stated in Court on
19 my judicial honor that I did not read
20 any other document pertaining to this
21 matter." (Northwest Fertilizer Hearing,
22 Tr. 15-16) (emphasis added).

23 And further:

24 "I think a few details of the
25 matters pertaining to the proposed
26 settlements in the sugar litigation
27 should be put on the record. The first
28 I heard of the proposed settlements
is when Mr. Ferguson telephoned me
and said that some proposed settlements
had been negotiated with three
defendants, I believe, and that he
wanted to do whatever might be
appropriate to move forward to some
action on those proposed settlements.
I said to him that, of course, I did
not want to have any information from
him or anyone else concerning the
details of the negotiations, but that
29 I thought that he might appropriately
30 lodge the material under seal with
31 the Clerk. I thought it best that
32 he bring the matter up at the
forthcoming pretrial conference, which
this morning I checked and found was

1 on the 9th of December, 1975. The
2 Freeman letter, which I received, I
3 think was dated the 26th, so I must
4 have gotten it several days later.
5 I happen to know Lee Freeman quite
6 well, and his forceful style in
7 presenting his contentions I am not
8 unacquainted with. I glanced through
9 his letter just enough to see that
10 he was much incensed about the matter.
11 I didn't feel it necessary to drop
12 him a note or anything else because
13 when counsel arrived the morning of
14 the pretrial conference I made it plain
15 that he would be, would have leave
16 to speak on this subject when the time
17 came. It was a rather warm and heated
18 dissertation between the counsel.
19 But the net result was that the material
20 was lodged under seal as I had suggested,
21 and that is all that I acquired in
22 the way of information about the
23 settlements at that time" (Ibid.,
24 Tr. 45-46) (emphasis added).

25 The Court thus asserted that he told plaintiffs'
26 counsel to file the materials under seal, represented that he
27 "had them sealed and lodged under seal," and stated further that
28 "the net result was that the material was lodged under seal as I had
29 suggested." But, as previously noted (p. 17, n. 7, supra), when
30 the original Holly statement was filed on December 5, 1975, it was
31 not under seal. Nor was the Freeman letter filed under seal,
32 as far as can be determined from the records of the Clerk. On
the contrary, since the letter had been the subject of extensive
colloquy both on and off the record,^{10/} it was expressly made
a part of the record of the December 10, 1975 hearing. (See

33
34 ^{10/} As indicated above, the issues raised in the Freeman letter
35 and the original Holly settlement agreement were discussed in
36 chambers with Judge Boldt prior to the Pretrial Conference on
37 December 9, 1975 (supra, p. 21).

1 pp. 22 - 23, supra.) Finally, the repeated assertion of the
2 Court that it knew nothing of the substance of the settlements,
3 like its statement in Pretrial Order No. 12, flies in the face
4 of the actual facts.

5
6 E. Summary

7 These recent misstatements by the Court of the facts
8 with respect to the Court's treatment of the settlements and
9 the Court's knowledge of the contents of those settlements,
10 read in the context of the profoundly disturbing series of ex
11 parte communications described above, now persuade defendants
12 that the Court was in fact improperly influenced in deciding
13 the class action issue by knowledge of the terms of the
14 settlements, that defendants' right to a trial by a neutral
15 and detached judge has been irrevocably lost, and that any
16 further participation in these cases by this Court is thereby
17 precluded.

18 The Court's single overriding objective in these
19 proceedings has been not to render justice on the merits, but
20 rather to ensure that its own prophecy expressed in its class
21 certification order -- that "there is a substantial possibility,
22 if not probability, that this litigation will not come to trial
23 in any forum" -- ^{11/} should be fulfilled. Defendants are
24 convinced that the ex parte communications between Mr. Ferguson
25 and the Court had the purpose and the effect of leading the
26

27 ^{11/} Order and Opinion Re Class Actions, dated May 20, 1976
28 (p. 29).

1 Court to adopt a course of conduct designed to induce the parties
2 to settle, and to ensure the viability of settlements once
3 entered, without regard to the merits of the litigation. The
4 appearance of impartiality, and the possibility of judicial
5 action free of bias and prejudice, have been irreparably
6 compromised.

7
8 III. ARGUMENT

9 Moving to disqualify a federal district judge is an
10 action which the moving defendants, and their undersigned
11 counsel, do not undertake thoughtlessly. The proceedings
12 are complicated multi-district proceedings, and the
13 decision to file this motion was made only after lengthy
14 and thoughtful deliberations among counsel, and numerous
15 consultations with their respective clients.

16 Although the facts upon which this motion is based
17 include some facts which date back to the earliest days of
18 these consolidated proceedings, the conviction on the part of
19 defendants and their counsel that fair and impartial proceedings
20 before this tribunal were no longer possible did not crystallize
21 until the recent events described above. In the light of these
22 events, a careful review of the record as a whole has brought
23 defendants to the reluctant but resolute conclusion that this
24 motion must be filed.
25

26
27 The two triggering events occurred on September 9 and
28

1 August 25, 1976.^{12/} Shortly thereafter, counsel for the moving
2 parties conferred and determined to inform the Court promptly
3 of their determination to file this motion and the accompanying
4 affidavits. On September 13, Messrs. Raven and Kirkham attempted
5 to arrange a conference with the Court and liaison counsel for
6 plaintiffs on either September 15 or 16, 1976 in order to present
7 this matter in chambers to the Court and to ask that all
8 proceedings be suspended until filing could be accomplished.
9 Messrs. Raven and Kirkham were informed by Mr. Gill, the Judge's
10 law clerk, that the first available opportunity to present this
11 matter to the Court was at a hearing in Boston on September
12 23, 1976.

13
14 Liaison counsel for defendants did meet with the Court
15 and liaison counsel for plaintiffs in chambers in Boston on
16 September 23, 1976, announced their intention to seek the relief
17 requested herein, and suggested that, given this intention,
18 argument upon the various matters scheduled to be presented
19 by the parties that day was inappropriate. Since all parties
20 were already in Boston and prepared to argue, however, it was
21 agreed that argument might be made without being deemed a waiver
22 by defendants of the issues to be presented in the instant
23 motion.

24
25
26 ^{12/} Counsel for defendants had received an oral report of the
27 Court's remarks at the hearing on September 9, but did not
28 receive a copy of the hearing transcript until September 20,
1976.

1 The undersigned counsel are fully cognizant of the
2 frequent injunction of the courts that affidavits and motions
3 under Section 144 be filed in "timely" fashion. At the same time they
4 have been equally concerned with their obligation, as officers
5 of the Court and as liaison counsel and associated counsel in
6 complex multidistrict litigation, to act out of the highest
7 sense of personal and professional responsibility in a matter
8 of this gravity. Undersigned counsel firmly believe that, in
9 filing this motion at this time, they have struck the proper
10 balance between the requirements of diligence and timeliness,
11 on the one hand, and the demands of prudence and professional
12 responsibility, on the other.^{13/}

13 A. Introduction

14
15 Parties to litigation in the federal courts have a
16 constitutional right to have a "neutral and detached judge"
17 preside over judicial proceedings. Ward v. Village of
18 Monroeville, 409 U.S. 57, 62 (1972). Fundamental to procedural
19 due process is the right of parties' litigant to have disputes
20 resolved by a tribunal free of personal bias or prejudice.
21 Essential to the vitality of a system which seeks to resolve
22 disputes not by the whim of human nature, but by the strength
23 of law, is a conviction that those charged with interpreting
24 and applying the law are doing so fairly and impartially.

25 To ensure litigants the impartial and unbiased tribunal
26 that due process and fundamental fairness require, Congress

27
28 ^{13/} The timeliness issue is discussed at greater length at
pp. 44-45, below.

1 has enacted two statutes applicable to the disqualification
2 of federal district court judges. Section 455 of the Judicial
3 Code provides for a judge to disqualify himself under certain
4 defined circumstances and in certain proceedings, including
5 "any proceeding in which his impartiality might reasonably be
6 questioned." Section 144 of the Code provides for
7 disqualification based upon the filing of a timely and legally
8 sufficient affidavit of bias or prejudice by a party litigant.
9 Disqualification is required in the present case whether the
10 standards employed be those of Section 455 or Section 144.

11 B. Section 455(a) of Title 28 Compels
12 Disqualification

13 The facts presented to the Court in the affidavits which
14 defendants have submitted herewith, as summarized and
15 supplemented above, require disqualification of this Court under
16 28 U.S.C. § 455(a), which is now the basic provision in the
17 Judicial Code concerning disqualification of judges. Section
18 455(a) provides as follows:

19
20 "Any justice, judge, magistrate, or
21 referee in bankruptcy of the United
22 States shall disqualify himself in
23 any proceeding in which his impartiality
24 might reasonably be questioned."
25 (Emphasis added.)

26 Section 455 was amended, effective December 5, 1974,
27 in order to eliminate certain limitations in the previous
28 statute, which provided for a judge to disqualify himself only
29 when "in his opinion" there were grounds for disqualification.^{14/}

30 ^{14/} Section 455 of Title 28 formerly read in full:

1 Section 455 now generally incorporates Canon 3C of the Code
2 of Judicial Conduct,^{15/} substituting a "reasonable man" test
3 for the "judge's opinion" test. The legislative history of
4 Section 455(a) describes its objectives as follows:
5

6 "Subsection (a) of the amended
7 section 455 contains the general, or
8 catch-all, provision that a judge shall
9 disqualify himself in any proceeding
10 in which 'his impartiality might
11 reasonably be questioned.' This sets
12 up an objective standard, rather than
13 the subjective standard set forth in
14 the existing statute through use of
15 the phrase 'in his opinion'. This
16 general standard is designed to promote
17 public confidence in the impartiality
18 of the judicial process by saying,
19 in effect, if there is a reasonable
20 factual basis for doubting the judge's
21 impartiality, he should disqualify
22 himself and let another judge preside
23 over the case. The language also has
24 the effect of removing the so-called

25 [Footnote continued]

26 "Any justice or judge of the United
27 States shall disqualify himself in
28 any case in which he has a substantial
29 interest, has been of counsel, is or
30 has been a material witness, or is
31 so related to or connected with any
32 party or his attorney as to render
33 it improper, in his opinion, for him
34 to sit on trial, appeal, or other
35 proceeding therein."

36 Note that it specified the situations where a judge should
37 disqualify himself.

38 ^{15/} Canon 3C, in relevant part, provides:

39 ✓ "(1) A judge should disqualify himself
40 in a proceeding in which his
41 impartiality might reasonably be
42 questioned, including but not limited
43 to instances where:

44 "(a) he has a personal bias or
45 prejudice concerning a party, or
46 personal knowledge of disputed
47 evidentiary facts concerning the
48 proceeding"

'duty to sit' which has become a gloss on the existing statute. See Edwards v. United States (5th Cir. 1964) 334 Fed. 360. Under the interpretation set forth in the Edwards case, a judge, faced with a close question of disqualification, was urged to resolve the issue in favor of a 'duty to sit'. Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system." H.R. Rep. No. 93-1453, 92d Cong., 2d Sess., appearing in 3 U.S.C. Cong. & Adm. News 6351, 6354-55 (1974).

As suggested by the legislative history and recognized by commentators, "[t]his [subsection] makes a drastic change in practice in the federal courts." 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3549, at 369 (1975). The amended statute requires that the Court examine the facts presented which suggest his bias or prejudice from an objective standpoint, rather than from a subjective point of view. Section 455 does not require disqualification of a judge merely at the whim of a displeased litigant. Rather, it mandates disqualification where there is "a reasonable question of impartiality."^{16/} The purpose of Section 455 is to establish a procedure for disqualification where the Court's actions may have created the "appearance of a lack of impartiality." 13 Wright, Miller & Cooper, supra, at 370.

^{16/} S. Rep. No. 93-419, 93d Cong., 1st Sess., 1973 p. 5.

As previously noted, Section 455(a) was modeled on Canon 3C of the Code of Judicial Conduct. The reporter of the Code stated the applicable standard for Canon 3C as follows:

"Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification.^{17/}

The legislative history of Section 455(a) comports with this approach:

"This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." H.R. Rep. 93-1453, supra, at 6355.

In Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), Justice Frankfurter declined sua sponte to participate in that case based upon his concern that he could not render an impartial judgment, concluding that the appearance of an unbiased administration of justice is as important as impartiality in fact. In United States v. Zarowitz, 326 F. Supp. 90 (C.D. Cal. 1971), Judge Hauk of the Central District of California found himself free of bias and prejudice under the former version of 28 U.S.C. § 455, yet recused himself on

^{17/} Thode, Reporter's Notes to Code of Judicial Conduct, 60-61 (1973).

1 the grounds that the allegation of bias made by two of the
2 defendants, based upon his receipt of ex parte reports concerning
3 wiretapping orders, created the appearance of impropriety.

4 The Court stated that the affidavits,

5
6 ". . . taken together do appear to
7 be sufficient, legally and factually
8 and standing as they must without
9 evidentiary contradiction, to show
10 the appearance of possible personal
11 bias or prejudice -- a showing which
12 necessarily gives us pause and dictates
13 that we disqualify and recuse ourself
14 sua sponte." 326 F. Supp. at 92
15 (emphasis in original).

16 In stating his reasons for recusal, Judge Hauk explained:

17 "[A] circumspect and punctilious
18 devotion to the ideal of justice in
19 the abstract as it appears to the public
20 at large, as well as the ideal of
21 fairness as it is applied concretely
22 in the case before us, affirms our
23 determination to disqualify and recuse
24 ourself. Like Caesar who parted from
25 his wife Pompeia because she was not
26 above suspicion, [footnote omitted]
27 so here to avoid even the appearance
28 of the possibility of personal bias
or prejudice, wise discretion and sound
judgment compel us to leave this case,
however reluctant we are to thrust
its burden upon another Judge of our
Court or to cause any delay or
inconvenience to the parties." 326
F. Supp. at 92.

Even though it found no "serious misconduct" on the
record, the Tenth Circuit in United States v. Ritter, 45 L.W.
2065 (10th Cir. Jul. 15, 1976), the most recent decision applying
Section 455(a), ordered the disqualification of federal District
Judge Ritter based upon his alleged personal relationship with

1 a defense attorney. Whether there was indeed impartiality was
2 not deemed the relevant question. Rather, the standard utilized
3 was whether, considering all of the facts, the judge's
4 impartiality might reasonably be questioned:

5
6 "The final question, and that which
7 disturbs us most, is whether in the
8 light of the total facts and viewing
9 the future of this case in the light
10 of Section 455(a), there exists
11 reasonable likelihood that the cause
12 will be tried with the impartiality
13 that litigants have a right to expect
14 in a United States district court.
15 Unfortunately we cannot predict that
16 it will be. Based upon all of the
17 facts and considering the broad language
18 of Section 455(a) requiring
19 disqualification in any proceeding
20 'in which his impartiality might
21 reasonably be questioned,' it is with
22 reluctance that we conclude that the
23 interests of justice require that the
24 cause be tried by another judge"
25 (45 L.W. 2065).

26 The moving defendants have presented in their affidavits,
27 in the affidavits of counsel, and in the above factual
28 chronology, a set of carefully documented, specific facts which
clearly support the disqualification of this Court from further
participation in these proceedings. Although, as has been
stated, two recent developments in August and September 1976
triggered the filing of this motion, the ultimate decision under
28 U.S.C. § 455(a) as to whether this Court's "impartiality
might reasonably be questioned" must draw, as the Tenth Circuit
correctly concluded in Ritter, upon "all of the facts" presented.
These facts include the following incidents:

1 1. The unusual circumstances surrounding the selection
2 of Mr. William Ferguson, a close personal friend of the Court,
3 to be Chairman of the Plaintiff's Steering Committee, involving
4 apparent ex parte contacts with the Court.

5 2. Apparent ex parte conversations between the Court
6 and Mr. Ferguson relating to the consolidation of the 1812 case
7 with the other cases consolidated before the Court.

8 3. Ex parte contacts between Mr. Ferguson and the Court
9 at the Fairmont Hotel concerning Pretrial Order No. 1.

10 4. Ex parte contacts between Mr. Ferguson and the Court
11 relating to the scheduling of defendants' discovery.

12 5. Ex parte contacts between Mr. Ferguson and the Court,
13 revealed by the Court on the transcript of a disqualification
14 hearing in the Northwest Fertilizer Cases on September 9, 1976,
15 relating to the settlement agreements executed by three of the
16 defendants.

17 6. Denial of knowledge of the contents of the
18 settlements. Although the Court had received and read the
19 Freeman letter, which described the terms of the Holly and other
20 settlements, and had otherwise been advised of the conditional
21 terms of such settlements; and, although the classes certified
22 by the Court comply precisely with the required conditions of
23 those settlements, the Court has flatly, and defendants are
24 convinced, falsely, denied learning of "the contents of the
25 settlements in any manner whatever."
26
27
28

1 7. The Court's erroneous insistence that the proposed
2 settlement agreements and the Freeman letter were "lodged under
3 seal" so that the Court was unable to know the contents of the
4 settlement agreements. As has been indicated, none of such
5 documents in fact was "lodged under seal."

6
7
8 C. Disqualification Is Also Required Under
9 28 U.S.C. § 144 and § 455(b) (1)

10 Although disqualification is clearly required under
11 the general standard of 28 U.S.C. § 455(a), defendants have
12 also met the more specific and rigorous standards of 28 U.S.C.
13 § 144 and 455(b) (1), and have accordingly filed affidavits of
14 bias and prejudice under those sections. Not only is there
15 an appearance of impartiality on the present record; that very
16 record demonstrates the existence of actual personal bias and
17 prejudice in favor of certain plaintiffs and against defendants.

18 It has long been recognized that freedom of the tribunal
19 from bias or prejudice is an essential element of due process.
20 E.g., Whitaker v. McLean, 73 App. D.C. 259, 118 F.2d 596 (1941).
21 First enacted in 1911 to provide a procedure for the invocation
22 of such rights to an impartial court, the section of the Judicial
23 Code which is now found at 28 U.S.C. § 144 provides:

24 "Whenever a party to any proceeding
25 in a district court makes and files
26 a timely and sufficient affidavit that
27 the judge before whom the matter is
28 pending has a personal bias or prejudice
against him or in favor of any
adverse party, such judge shall proceed
no further therein, but another judge

1 shall be assigned to hear such
2 proceeding.

3 "The affidavit shall state the facts
4 and the reasons for the belief that
5 bias or prejudice exists, and shall
6 be filed not less than ten days before
7 the beginning of the term at which
8 the proceeding is to be heard, or good
9 cause shall be shown for failure to
10 file it within such time. A party
11 may file only one such affidavit in
12 any case. It shall be accompanied
13 by a certificate of counsel of record
14 stating that it is made in good faith."

15 28 U.S.C. § 455(b)(1) also mandates disqualification
16 of a judge when he has a personal bias or prejudice:

17 "(b) He [any judge] shall also
18 disqualify himself in the
19 following circumstances:

20 "(1) Where he has a personal
21 bias or prejudice concerning
22 a party, or personal
23 knowledge of disputed
24 evidentiary facts concerning
25 the proceeding. . . ."

26 This motion is grounded upon both 28 U.S.C. § 144 and 28 U.S.C.
27 § 455(b)(1), as well as upon 28 U.S.C. § 455(a).

28 Until 1974, when provisions of Canon 3C of the Code
of Judicial Conduct for federal judges were adopted as amendments
to Section 455 of the Judicial Code, thus broadening the reach
of Section 455, Section 144 was the primary means by which a
party might raise the bias or prejudice of a judge. As noted
above, Section 455 is presently the basic provision for
disqualification, although most of the judicial decisions
considering disqualification arose under Section 144.

1
2 1. The Affidavits Are Timely

3 Section 144 requires that an affidavit of bias or
4 prejudice be "timely," and provides further that it "shall be
5 filed not less than ten days before the beginning of the term
6 at which the proceeding is to be heard, or good cause shall
7 be shown for failure to file it within such time." Inasmuch
8 as terms of court were abolished in 1963, the "ten day"
9 requirement can no longer be applied; rather, the rule now
10 applied is that the affidavit must be filed "with reasonable
11 diligence." Bradley v. School Board of City of Richmond,
12 Virginia, 324 F. Supp. 439, 443 (E.D. Va. 1971); 13 Wright,
14 Miller, & Cooper, Federal Practice and Procedure § 3551, at
15 379 (1975); Note, Disqualification of Judges for Bias in the
16 Federal Courts, 79 Harv. L. Rev. 1435, 1444 (1966). Defendants
17 have acted with reasonable diligence in the present case.

18 The circumstances which governed the timing of the filing
19 of the present affidavits and motion are set forth in detail
20 above (pp. 32-34). The incidents upon which defendants rely
21 are cumulative in nature. The earlier incidents can be clearly
22 understood only by reference to the latter. It is the very
23 pattern of judicial conduct itself which gives particular
24 significance to the individual acts of the Court, and to the
25 various ex parte communications described above. Thus, these
26 affidavits, being filed within a reasonable time from the events
27 of September 9 and August 25, 1976 (the Court having been
28 informed on September 23 that they would soon be filed, and

1 an attempt having been made to arrange to inform the Court of
2 this fact as early as September 13), are "timely" filed within
3 the meaning of that term as used in 28 U.S.C. § 144.

4 This motion is not made after trial, or during trial,
5 or on the eve of trial. It is made near the outset of a lengthy
6 series of pretrial proceedings which will, in all probability,
7 continue for several years. Where bias and prejudice have been
8 shown, fundamental fairness requires that the Court step aside
9 so that the parties may have the benefit of a fair and impartial
10 tribunal in the proceedings to follow.

11 Moreover, putting 28 U.S.C. § 144 aside, there is no
12 timeliness requirement imposed in connection with 28 U.S.C.
13 § 455(a), under which section this motion is also brought.
14 Section 455(a) provides that a judge shall disqualify himself,
15 without the need for any affidavit to be filed and without
16 reference to the timeliness of the filing of any motion, "in
17 any proceeding in which his impartiality might reasonably be
18 questioned." As has been demonstrated more fully above (pp.
19 35-42), Section 455(a) is concerned not only with fairness to
20 the parties, but also with the appearance of judicial
21 impartiality, with the very integrity of the judicial system
22 itself. Thus disqualification is clearly required upon a showing
23 under Section 455(a) -- as has been made in the present case --
24 that the Court's impartiality might reasonably be questioned,
25 no matter when such showing is made.

1 2. The Affidavits of the Parties
2 Are Sufficient To Indicate the
3 Court's Personal Bias

4 Section 144 was first interpreted in Berger v. United
5 States, 255 U.S. 22 (1921). In passing upon the sufficiency
6 of a party's affidavit alleging the personal bias and prejudice
7 of the district court judge, the Supreme Court held that a
8 challenged judge must assume the truth of the facts contained
9 in the affidavit, and must only decide whether the alleged facts,
10 taken as true, give "fair support" to the charge. See also
11 Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98,
12 100 (5th Cir. 1975); Davis v. Board of School Com'rs of Mobile
13 County, 517 F.2d 1044, 1051 (5th Cir. 1975); Pfizer Inc. v.
14 Lord, 456 F.2d 532, 537 (8th Cir. 1972). In accordance with
15 this established standard, this Court's review of the attached
16 affidavits pursuant to Section 144 should be restricted to the
17 legal question of their sufficiency.

18 In order to be held legally sufficient for disqualifi-
19 cation, a party's affidavit may not rely on mere assertions
20 or conclusions, but must set forth facts which "give fair support
21 to the charge of a bent of mind that may prevent or impede
22 impartiality of judgment." Berger v. United States, supra,
23 at 33-34; United States v. Townsend, 478 F.2d 1072, 1073-74
24 (3d Cir. 1973). The affidavits submitted by defendants here
25 fully meet this requirement.

26 As the Court stated in Berger:
27
28

"The belief of a party the section makes of concern and if opinion be nearer to or farther from persuasion than belief, both are of influence and universally regarded as of influence in the affairs of men and determinative of their conduct" Berger v. United States, supra at 34 (emphasis added.)

The affidavit must reasonably support the belief of the affiant that bias exists, but need not necessarily prove bias in fact. As one commentator has stated:

"A formulation more in keeping with the purpose of the statute would require only that the facts alleged must justify a reasonable apprehension on the part of the affiant that the judge may be biased. This formulation shifts the emphasis from the judge's actual state of mind to the reasonableness of the litigant's fear, an emphasis at least supported, and possibly required, by the statutory language. . . ." Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1446-47 (1966) (emphasis added).

It was established very early in the history of Section 144 that a party may rely upon information and belief derived from others in setting forth the facts upon which his affidavit of bias rests, so long as the information concerns a definite incident, and its time and place given. Berger v. United States, supra at 34. Defendants' affidavits are also sufficient in these respects.

Both Section 144 and Section 455(b)(1) require that the bias of the Court for or against a party be a "personal" bias, that is, that it stem from an extrajudicial source. United

States v. Grinnell Corp., 384 U.S. 563, 583 (1966). An early leading case explains that:

"'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute."

Craven v. United States, 22 F.2d 605, 607 (1st Cir. 1927), cert. denied, 276 U.S. 627 (1928); 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3542 at 346 (1975).

It is clearly not sufficient that a litigant be dissatisfied with a court's judicial rulings however erroneous he may believe such rulings to be. The moving defendants do not predicate this motion upon such grounds. Defendants rely rather upon persistent evidence of the court's personal bias.

The affidavits submitted with this motion and the facts summarized above disclose a number of ex parte communications between this Court and the Chairman of the Plaintiffs' Steering Committee which both establish a personal bias in the Court's relationship with that attorney and constitute the extrajudicial source of that bias and prejudice. Courts have often deemed such ex parte communications extrajudicial and legally sufficient cause for disqualification where they have resulted in bias or the opportunity for the communication of prejudicial information to the court.

In United States v. Sciuto, 531 F.2d 842, 845-46 (7th Cir. 1976), the court held that disqualification under Section

1 144 was appropriate on the basis of the presiding judge's ex
2 parte conversations with a probation officer concerning the
3 revocation of defendant's probation. Similarly, in Schmidt
4 v. United States, 115 F.2d 394 (6th Cir. 1940), the Court of
5 Appeals disqualified the district court judge under Section
6 144 where the affidavits of bias and prejudice alleged that
7 during grand jury proceedings the district judge held two
8 conferences with the District Attorney relating to the possible
9 indictment and trial of the defendant. See also Nations v.
10 United States, 14 F.2d 507 (8th Cir.), cert. denied, 273 U.S.
11 735 (1926).

12 Canon 3A(4) of the Code of Judicial Conduct expressly
13 prohibits ex parte communications:
14

15 "A judge should accord to every person
16 who is legally interested in a
17 proceeding, or his lawyer, full right
18 to be heard according to law, and,
19 except as authorized by law, neither
initiate nor consider ex parte or other
communications concerning a pending
or impending proceeding. . . ."

20 The ex parte communications described above should not be
21 considered in a vacuum. The sufficiency of this motion to
22 mandate disqualification is established by the appearance of
23 prejudice and bias that has been created over a period of time,
24 crystallizing and culminating in the Court's deliberately
25 misleading order stating that the Court knew nothing about the
26 terms of the pending settlements, and the revelation by the
27 Court of the ex parte communication between Mr. Ferguson and
28 the Court concerning those settlements. Such communications

1 must be viewed in light of the record of these proceedings taken
2 as a whole, including the Court's rulings on such matters as
3 consolidation of the 1812 case, the schedule for class action
4 discovery and briefing, and class certification. As the Second
5 Circuit held in Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir.
6 1968):

7
8 "On the other hand, to establish the
9 extrajudicial source of bias and
10 prejudice would often be difficult
11 or impossible and this is not required.
Comments and rulings by a judge during
the trial of a case may well be relevant
to the question of the existence of
prejudice.^{18/}

12 In this factual context, the course of ex parte
13 communications between the Court and Mr. Ferguson can be properly
14 seen as necessarily influencing this Court to the extent that
15 its decisions have not, and cannot, be rendered free of bias
16 and prejudice as required by due process of law. The
17 circumstances surrounding the selection of Mr. Ferguson as the
18 Chairman of Plaintiffs' Steering Committee, and the subsequent
19 ex parte contacts between the Court and Mr. Ferguson indicate
20 a personal bias inconsistent with impartiality.
21

22
23 ^{18/} Commentators also concur in this approach:

24 "However the rule that bias to be
25 disqualifying must be extrajudicial
26 in origin does not mean that nothing
27 that happens in the courtroom is
28 relevant. The judge's behavior during
the trial may demonstrate the existence
of a personal bias." Wright, Miller
& Cooper, Federal Practice and Procedure
§ 3542 at 352-53.

Moreover, the facts recited with respect to the ex parte communications between Mr. Ferguson and the Court, and the circumstances surrounding Mr. Ferguson's decision to support consolidation of the 1812 case and his selection to head Plaintiffs' Steering Committee, might well lead a reasonable man to conclude that the Court had violated Canon 2B of the Code of Judicial Ethics. Canon 2B provides in relevant part:

"A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him.
. . ."

A party's affidavit that discloses facts reasonably suggesting a court's personal bias or prejudice in favor of or against a party or a party's attorney which produces a "bent of mind that may prevent or impede impartiality of judgment" is sufficient to require disqualification. In United States v. Ritter, 45 L.W. 2065 (10th Cir. July 14, 1976), the Tenth Circuit recently noted that bias in favor of or against an attorney involved in the litigation may be a sufficient ground for disqualification of a judge:

". . . bias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality must reasonably be questioned in relationship to the party." (45 L.W. 2065).

The Court has displayed such a bias or prejudice in favor of Mr. Ferguson, his clients, and those other parties in whose behalf Mr. Ferguson speaks as Chairman of Plaintiffs' Steering Committee.

IV. CONCLUSION

This Court's repeated ex parte communications with the Chairman of Plaintiffs' Steering Committee and untrue statement in the order of August 25, 1976, as illuminated by the factual chronology and the affidavits submitted herewith, suggest to any reasonable observer that the Court has been improperly influenced. The appearance of this Court's impartiality has been seriously eroded. The requirements of due process and fundamental fairness as well as those of the law as expressed in 28 U.S.C. § 455 and 28 U.S.C. § 144 demand that this Court disqualify itself from further participation in these proceedings.

Therefore the moving defendants respectfully request, pursuant to Sections 455(a), 144, and 455(b)(1) of the Judicial Code, that the Court disqualify itself from any further participation, whether for trial or pretrial purposes, in any case presently consolidated in or hereafter made a part of MDL-201.

Respectfully submitted,

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August 18, 1975

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Mr. Lawrence Keeshan
Heller, Ehrman, White & McAuliffe
Thirtieth Floor, Wells Fargo Building
44 Montgomery Street
San Francisco, California 94104

Re: Sugar Cases

Dear Lawrence:

Enclosed herewith is the original of Pretrial Order No. 2, which was signed by Judge Boldt in his chambers at Tacoma, Washington today.

Judge Boldt inquired as to the procedure from here on out, as far as it was scheduled, and I reminded him that we were contemplating a pretrial conference and a hearing on the class action motions around November 1, 1975. Judge Boldt reminded me that he had informed us of a trial date he has in Knoxville, Tennessee on November 3, and requested that we schedule the pretrial conference and hearing immediately before his leaving for Knoxville. Judge Boldt indicated that if necessary, he would have our hearing on the 3rd of November and defer the Knoxville case an additional day. All schedules should be consolidated to fit this hearing date in the present program.

Since I was unable to reach Steve Bomse today and he did not call me this morning as he promised, I had to present the order without benefit of defense counsel. Judge Boldt asked me to pass on to the defendants that he would like to have a representative of the defendants attend those matters in the future so that he could, if necessary, ask questions or pass on his thinking to both sides. This order had to be presented today because Judge Boldt was leaving Tacoma for a ten-day trip out of the city, so I had no alternative but to proceed when I could not reach Steve.

EXHIBIT A

page 2
Mr. Lawrence Keeshan
August 18, 1975

Re: Sugar Cases

It is my understanding following our telephone conversation this afternoon, that you will proceed to file the original and will distribute the copies to the defendants. I am asking Joe Cooper to send copies to the plaintiffs. For your information I have given Judge Boldt the two xerox copies that were sent to me. I have retained a conformed copy in our file and am enclosing with Joe's copy of this letter a conformed copy for his file and for his use in sending out copies to the plaintiffs.

Thank you for your cooperation in this matter.

Very truly yours,

FERGUSON & BURDELL

Wm. H. Ferguson

By: Wm. H. Ferguson

WHF:mlh

Enclosure

cc: The Honorable George H. Boldt
P.O. Box 1993
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August 21, 1975

Wm. H. Ferguson, Esq.
Ferguson & Burdell
1700 Peoples National Bank Building
Seattle, Washington 98171

Re: Sugar Cases

Dear Bill:

We have thus far had a good relationship in the above cases and I am hopeful that it will continue. Therefore, I ascribe the events of this past Monday to a mutual failure of communication for which no responsibility need be assessed. Nonetheless, I do feel obliged to offer some comments which will, hopefully, obviate a repetition of those events in the future.

It is defendants' position that, as a general rule, the submission of proposed orders or other matters to the Judge should be handled by written communications or delivery to the Court clerk and does not require personal presentation by representatives of plaintiffs and defendants. As I am sure you can appreciate, the thought that I, or someone else, is required to travel to Tacoma each time a paper needs to be presented to the Judge is an unpleasant prospect, at best.

If Judge Boldt wishes to get in contact with counsel because of some uncertainty or other question regarding a paper submitted to him, he is very capable of doing so as he has made clear in his first letter to counsel and in his remarks to us at the initial Pretrial Conference.

Our objection to the procedure of personally presenting matters to the Judge in chambers is also based upon our position that informal and unreported communications with the

EXHIBIT B

圖 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840.

總編輯：陳其南
 副總編輯：陳其南
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Wm. H. Ferguson, Esq.

H. E. W. & H⁹A. TO

DATE: 8/21/75

P. 3

Court should be avoided to the greatest extent possible. While we certainly appreciate the desirability of streamlining procedures, a more fundamental goal is the protection of all parties' substantive rights. Therefore, it is defendants' view that informal meetings and other unrecorded communications should be kept to a minimum. This is particularly true since, of necessity, counsel for all parties will not be represented at these informal sessions, yet the rights of such parties may nonetheless be significantly affected. In short, we think that in the long run everyone's interests will be best protected if matters occurring in the cases are generally made of record so that any party feeling aggrieved will have an adequate basis for seeking appellate review of the issue at the appropriate time.

Finally, the concerns expressed above apply with far greater force to ex parte communications, such as apparently occurred between you and Judge Boldt on Monday. Your letter of the 18th to my associate, Larry Keeshan, suggests that there was a scheduled conference which we simply failed to attend. Without arguing the matter at length, that was not the case and there was certainly no reason why Pretrial Order No. 2 could not simply have been delivered to the Judge's chambers (perhaps with a note to call counsel if the Court had any questions about its form or content).

From your letter, it appears that not only did you appear ex parte, but that you discussed with the Judge future scheduling of events in the case. We do not approve of that practice and certainly hope that it will not be repeated.

We do not know and, thus, cannot comment upon the prevailing practice in your district. However, in the Northern District of California (to which these cases have been assigned and by whose rules they are governed), no lawyer would be permitted to communicate directly with the Court about pending litigation in the absence of opposing counsel. As noted above, we regard last Monday's events as a misunderstanding. However, we wish to make it clear that defendants expressly object to any such ex parte communications in the future whether by you or by any other lawyer in these cases.

We, of course, realize that from time to time there may need to be exceptions to the foregoing. If the issue truly requires it, we are prepared to meet with Judge Boldt in Tacoma, or at any other place where he may be, for that matter. We would hope, however, that such instances will be the exception.

rather than the rule, and that the position of defendants,
as set forth above, is now clearly expressed.

Very truly yours,

Stephen V. Bomse
of HELLER, EHRMAN, WHITE & MCAULIFFE

cc: Josef D. Cooper, Esq.

1 MR. FERGUSON: Your Honor, since this is
2 your first appearance in this case -- we are a little
3 outweighed in numbers. I will introduce my side, and I
4 think Mr. Michael of Pillsbury, Madison and Sutro will take
5 care of the others.

6 THE COURT: You may do that.

7 MR. FERGUSON: We have, from the State
8 of Alaska, Tom Wickwire, Attorney General, standing back
9 there; from the State of Idaho, Rudy Barchas; from the State
10 of Montana, Special Assistant Attorney General, Walter
11 Murfitt.

12 Now, we have the great State of Washing-
13 ton represented by Tom Boeder. And then we have the
14 plaintiffs Smith and Minoggie, represented by Bruce Hall.
15 Then you have, from Ferguson and Burdell, myself, Mr. Tom
16 Jerry Greenan, G-R-E-E-N-A-N. His name is Thomas, but we
17 all call him Jerry. We have Dave Sheppard, and we have
18 Christopher Kane.

19 THE COURT: It is a pleasure to see all
20 of you, and those who I don't know I am pleased to meet. I
21 look forward to becoming better acquainted with you.

22 MR. SIDERIUS: Plaintiffs and interven-
23 tion are represented by myself, Ray Siderius, and my
24 partner, Charles Lanigan.

25 THE COURT: I gave Mr. Siderius leave to

1 be here but nothing more than that.

2 MR. SCHUCK: May I introduce some of the

3 to introduce people?

4 THE COURT: Certainly.

5 MR. SCHUCK: Your Honor, as you know,
6 my name is Carl Schuck. I am from Los Angeles, and my
7 partner --

8 THE COURT: I'm acquainted with you, Mr.
9 Schuck.

10 MR. SCHUCK: Fred Clark is here from my
11 firm, from the Pillsbury firm, representing Chevron, Mr.
12 James Michael, Mr. Gary Anderson. Your Honor, from the
13 McBride firm, representing Cominco, we have Mr. Magee. I
14 think you know Mr. Magee.

15 THE COURT: Yes, yes, I do know him.

16 MR. SCHUCK: And also Mr. Frank Lane,
17 Tom Franklin. And then representing the Phillips Petroleum
18 Company from Bogle and Gates, Peter Byrnes, and Mr. Clinton.

19 MR. CLINTON: Good morning.

20 THE COURT: How do you do.

21 MR. SCHUCK: Then representing the Union
22 Oil Company, the Brobeck firm in San Francisco, Mr. Richard
23 Haas, H-A-A-S.

24 THE COURT: Good morning.

25 MR. SCHUCK: And then representing Western

1 Farm Service, Mr. William Simon.

2 THE COURT: Good morning, Mr. Simon.

3 MR. SCHUCK: And also Mr. Richard
4 Coleman. I might say the co-counsel with us, associated in
5 this matter, a Mr. Frederick Halverson of Yakima, Washington.

6 MR. HALVERSON: Good morning.

7 THE COURT: Good morning.

8 MR. SCHUCK: And this is Mr. Gleco (pho-
9 netic), Mr. Flamenco (phonetic), Mr. Stanton. And have I
10 missed you, Mr. Pullman? Yes, Mr. Stewart. It is obvious,
11 Your Honor, I have to meet some of these people myself.

12 THE COURT: As I have said so many times,
13 I love lawyers. One of the joys of my judicial career.

14 MR. SCHUCK: There is also Mr. McWilliams,
15 associated with Mr. Simon, I think.

16 THE COURT: I am very pleased to meet all
17 of you. Quite a number of you I already know well. And per-
18 haps you have heard me say on other occasions that one of
19 the richest rewards for judicial service, in my opinion, is
20 the opportunity to be one acquainted with lawyers in so
21 many different areas, and, of course, that has been an
22 exceptional one in my case because I have traveled so widely
23 all over the globe that the United States has jurisdiction
24 in. And I feel that way about this again today. Did you
25 have some other statement to make?

1 MR. SCHUCK: Yes, Your Honor, I did have
2 a suggestion regarding a schedule for today. If this is
3 the appropriate time to take it up.

4 THE COURT: Perhaps you had better wait
5 just a minute and let me suggest a schedule. Yesterday
6 morning I was up in the north Cascades on judicial business,
7 for which I started off about 6 o'clock in the morning. It
8 was a beautiful day and beautiful weather. I got back from
9 this very strenuous day in time to catch the 6:05 flight
10 from Seattle to Spokane. I got to the hotel at about a
11 quarter after 7, with no dinner yet, and I found on the desk
12 this packet of documents pertaining to the motion for my
13 disqualification as judge in this proceeding. It was
14 rather lengthy, and by the time I had had dinner, I was
15 exhausted. And, in order to be sure I give my best efforts,
16 which are always the earliest ones in the morning, I got
17 up very early this morning, and I read every page of these
18 documents. So I understand the contents of them.

19 We will first take up the application for
20 me to recuse myself. I think you can count on my having
21 read this material. Now, this was so belatedly served on
22 me, that it is not really fair to be burdened with that
23 much material, none of which I have ever seen before. But
24 I realize the circumstances of my being here caused a
25 situation in which there was nothing else to do but go ahead.

1 Therefore, at any time in whatever remarks I may make later,
2 I may not be as fully informed on the other side of the
3 case because I have nothing from them yet in response to
4 the motion. But I would assume that counsel for those op-
5 posing will adequately present their views and their
6 contentions in their presentation.

7 If you have any papers that you have
8 filed in this proceeding, or in any other, that bear on
9 the present subject, why, I assume that you would give them
10 to me. But I am not concerned with that at this time
11 because, of course, I can't read and listen both at the
12 same time. And it may well be that it will not be necessary
13 for me to read the material.

14 I would think that, in the circumstances,
15 20 minutes a side should be sufficient. Do you agree?

16 MR. SCHUCK: That may be a little short,
17 Your Honor. The matter is of considerable seriousness, and

18 THE COURT: How much time would you
19 like?

20 MR. SCHUCK: I would think about a half
21 an hour, Your Honor.

22 THE COURT: All right, a half an hour
23 a side. Is that agreeable?

24 MR. GREENMAN: Certainly, Your Honor.

25 THE COURT: Very good, so ordered. The

1 proponents may begin.

2 MR. SCHUCK: May I just mention one
3 other thing having to do with the scheduling, Your Honor,
4 and it has to do with the fact that we appreciate the fact
5 that this was belatedly served. I mean, we just received
6 it last night. The same was true for plaintiffs' counsel.
7 And, in fact, many of the defense counsel didn't receive
8 some of these materials until this morning. And, if I may
9 explain how it all came about. We had a motion, as Your
10 Honor may know, that was heard before Judge Neill last
11 Friday on this same subject, at which time he felt, though
12 he felt that were such a challenge addressed to him he
13 would step aside, he felt that this was a question that
14 should go to you quite properly he felt. At that time,
15 recognizing the shortness of time --

16 THE COURT: That, of course, would have
17 been the proper procedure.

18 MR. SCHUCK: Recognizing the shortness
19 of that time, at that point we made the motion and request
20 that there be some opening of time here so that we could
21 get the papers ready, so that counsel and Your Honor and
22 all that would have several days to get with them. So
23 that this important matter could be taken up in that fashion.
24 Unfortunately, you could not reschedule your calendar. We
25 could not meet on this matter until yesterday morning, Your

1 Honor. It was for this reason that these things were put
2 together in quite a hurry yesterday.

3 Now, the matter, Your Honor, is of such
4 great importance and requires such serious consideration
5 that I have some alternatives to suggest. I do think Your
6 Honor should have the opportunity to look it over care-
7 fully. I also think that counsel, that we have a dispas-
8 sionate argument on this matter. And if that means that
9 we should possibly hold off on the argument until this
10 afternoon. Or even if Your Honor wants to do it next
11 Monday or Tuesday.

12 THE COURT: It is out of the question.
13 We are going to resolve it today.

14 MR. SCHUCK: Very well.

15 May it please the court --

16 THE COURT: By the way, you mentioned
17 the importance of the issues. You haven't mentioned that
18 it involves very serious questions pertaining to me,
19 personally. So you can be sure that I am very much inter-
20 ested and anxious to hear everything that everybody has to
21 say on it.

22 MR. SCHUCK: Yes, Your Honor, if there
23 is any one thing that we wish to say, that we realize that
24 this is a distressing matter. It must be personally dis-
25 tressing for Your Honor. And it is certainly an exceedingly

1 delicate matter. And it is one that, so far as I'm concerned
2 is made with the greatest of reluctance.

3 THE COURT: I am not distressed about it.
4 Goodness knows, if you can't take the heat, you should stay
5 out of the kitchen, according to President Truman. And I
6 am under much greater heat every day in a litigation I am
7 conducting over in my own district. In fact, some of the
8 suggestions have been rather horrendous. So I am not
9 distressed at all in a matter of this kind excepting to
10 make the record indelibly clear with respect of some of the
11 representations that are made in these papers.

12 MR. SCHUCK: Nonetheless, Your Honor,
13 the matter is sensitive, and we are keenly aware of the
14 sensitivity. And we approach it with the greatest attitude
15 of respect. I want you to understand that.

16 THE COURT: I accept that without quali-
17 fication. I know many of these gentlemen here, and every
18 one of them, I know, is a gentleman. I know he must feel
19 a little hesitant about seeming to be criticizing me. But
20 let each of you that has any such qualms be at ease. It
21 doesn't bother me a bit. It is your duty to represent your
22 clients according to what you think their best interests
23 are. I wouldn't have any respect for you if you didn't.

24 MR. SCHUCK: I appreciate that, Your
25 Honor. That is the basis upon which we are approaching this

1 matter.

2 THE COURT: Right.

3 MR. SCHUCK: Your Honor, I would like to
4 point out at the very outset that neither my client nor I
5 are in any way involved in the sugar litigation. As Your
6 Honor knows, many of the matters discussed here have to do
7 with what transpired in that lawsuit. But there is a
8 sincere feeling that under the circumstances any interest
9 suggests, Your Honor should disqualify yourself. The basis
10 here, as Your Honor knows from the papers, is under 455,
11 and particularly A, which states that "any judge shall, and
12 it is mandatory, disqualify himself in any proceeding in
13 which his impartiality might reasonably be challenged."

14 And I might say, Your Honor, we are
15 talking about something quite different than what the
16 situation was before the statute was amended in that fashion
17 in 1974. We are talking about the broader grounds that have
18 been inserted into the statute following the difficulties
19 of that very difficult time in the national history. And I
20 should say I am sure Your Honor is aware that that section,
21 together with the ABA Canons of Judicial Responsibility was
22 responsive to a felt need that the public confidence in our
23 judicial system is of the highest importance. And
24 therefore, it is not just a question as to whether there is
25 a pecuniary or some other interest of this kind, not just a

1 question as to whether, in fact, there is biased or parti-
2 ality, but also, and most importantly, whether, under these
3 circumstances, there is an appearance of that. And this is
4 the area that --

5 THE COURT: It is all in your memorandum.
6 You are quoting the things I read this morning just a
7 little while ago and are very clear. I suggest you skip
8 over that type of thing and get down to the nub of the
9 matter.

10 MR. SCHUCK: Your Honor, the nub of the
11 matter in here is in the three affidavits that Your Honor
12 has received from defense counsel, from Mr. Doppelt and Mr.
13 Dunn, and these proceed on three broad grounds. We believe
14 there has been a disregard of settled rulings of the 9th
15 Circuit in intensely critical areas of anti-trust. We
16 believe there is a distinct appearance that willing or not
17 this court may be disposed to certify large classes to
18 impose settlement leverage in cases of this kind in order
19 to resolve in that fashion, manageability problems presented
20 by these cases, and then thirdly, the broad ground dealing
21 with the possible personal relationship as it may effect
22 one of the very important challenges that we are going to
23 address in this matter against Mr. Ferguson.

24 As for the 9th Circuit situation and the
25 settled rulings there, as Your Honor is aware from reading

1 the papers, these concern what I regard to be, and I think
2 what most everybody would have to regard in cases of this
3 kind, as being the very critical areas in anti-trust class
4 actions of whether or not each class member and his claim
5 is involved in any kind of an impact from the conspiracy.
6 And if so, what, if any, may be his damages. I am sure
7 Your Honor is aware of comments made, and the rulings made
8 in the sugar opinion about impact being provable from just
9 an illustration of generalized injury, or that impact will
10 be presumed once there is a demonstration of an unlawful
11 conspiracy, and the other statements that damages can be
12 shown by an aggregate, through the use of appropriate formulae
13 or through sophisticated sampling, pooling, or other
14 sophisticated techniques.

15 These positions, we feel, are firmly
16 stated and are the underpinning of the sugar opinion. And
17 these are directly critical to the class issues in this
18 lawsuit. And this is not just another lawsuit. This is
19 a very serious case seeking various -- making very serious
20 charges and seeking very large amounts of money from the
21 defendants. The critical and pertinent matter is that on
22 those points that I have just adverted to, Your Honor, and
23 the decisions of the 9th Circuit in Klein and also in the
24 Hotel Telephone Charges case, precisely the same contentions
25 were made. I personally know about the Klein, because I was

1 involved in that one all the way up to the U.S. Supreme
2 Court. And I know those charges were also made in the Hotel
3 Telephone Charges case, and there is just no question, in
4 my humble opinion -- and I certainly realize that lawyers
5 can disagree to some extent -- but quite flatly, in re
6 Klein case, though there was a claim that the injury of
7 these class members could be established through generalized
8 proof using per se rules with the amount left to a mechanical
9 procedure for separate adjudication, nonetheless, the Klein
10 case explicitly rejected those approaches. And, Your Honor,
11 in that respect, we have made the citations and I am not
12 going to repeat them, Your Honor, but the very point about
13 the use of generalized theories, and the very point that
14 each class member's claim must be established as to both
15 impact and damages is the square holding of the Klein case.
16 Now, the Klein case involved with the plaintiffs class and
17 the defendants class. And in reading Your Honor's Sugar
18 Opinion, the Klein case is dealt with on the theory that it
19 was just a question of liability on the part of the defen-
20 dants.

21 Well, unfortunately, Your Honor, it
22 involved much more than that. It was a class of about
23 400,000 sellers of real estate involved. And the point of
24 that case was, and the final ruling was, that that class
25 could not stand because it could only stand if one were to

1 allow a generalized method of proof in terms of both impact
2 and damages. And Your Honor, the second point in that re-
3 gard is that in the Sugar Opinion Your Honor has taken the
4 flat position that damages can be shown through a generalized
5 approach, through an aggregating of damages, exactly that
6 point was involved in the Hotel Telephone Charges case and
7 in an opinion by Judge Walter Ealy, written by Judge Walter
8 Ealy, that method, which is a fluid recovery method, was
9 explicitly rejected, Your Honor, with a favorable citation
10 to Judge Harold Medina's opinion in Eisen III. And Judge
11 Ealy said, and the opinion says, "this involves a serious
12 and a substantial watering down of the substantive rights of
13 the defendant." And imbedded in this entire picture is the
14 fundamental precept that it is not just the question of what
15 the plaintiff needs to do in order to get to the jury, to
16 get past the motion for summary judgment or a motion at the
17 end of the plaintiff's case, but the question is, in the
18 perspective of the entire litigation, including the right
19 of the defendants to defend themselves right down the line.
20 And we feel that this matter is so serious, and it was so
21 flatly written out in the Sugar Opinion in opposition to the
22 flat rulings of the 9th Circuit, that in this area in
23 particular, there is a foreclosure of an opportunity on our
24 part to be able to have a fair and even hearing on this
25 matter if this matter is heard by Your Honor.

1 Now, the second area that we are
2 addressing ourselves to is that there exists in our estimation,
3 and in the estimation of our clients, the appearance
4 of bias in the use of class certifications in order to
5 impose settlement pressures as a means of solving otherwise
6 unmanageable class litigation. Now, Your Honor, I can point
7 to, and we point to the transcript and records which are
8 before Your Honor in those papers from the sugar proceedings,
9 which, to my mind, make it quite clear that some massive,
10 multi-million dollar settlement, I believe on the order
11 of \$20 million, had been negotiated between certain defendants
12 and Mr. Ferguson, the same Mr. Ferguson who is
13 leading this case, that this was done while the matter was
14 under submission to Your Honor. And we are shaken, very
15 much shaken by such things as the affidavit of Mr. Robert
16 Raven, who is a respected member of the Bar of California,
17 very active in the American Bar Association, and other
18 places, to the effect and all the statement of Mr. Lee
19 Freeman of Chicago, to the effect that that settlement was
20 conditioned upon classes being certified in a certain way,
21 and some classes not being allowed, to-wit: the consumer
22 classes.

23 THE COURT: Does Mr. Raven include in
24 his affidavit my statement in open court when the matter
25 was first brought before the court that I had not read any

1 of the contents of those papers? I had them sealed and
2 lodged under seal, and that I did not, in any way, read or
3 have anything to do with those matters until they were
4 opened in open court? He makes no mention of that. And he
5 makes no mention in his affidavit that I expressly stated
6 in court on my judicial honor that I did not read any other
7 document pertaining to this matter.

8 MR. SCHUCK: The Raven affidavit, Your
9 Honor, --

10 THE COURT: There is nothing about that
11 in there, is there?

12 MR. SCHUCK: The Raven affidavit -- whether
13 that statement of Your Honor is in here or not, I don't
14 remember. I don't think it is in this affidavit.

15 THE COURT: You can see if it is. I
16 read it this morning. He didn't include any of that. There
17 is a transcript on that, too, by the way.

18 MR. SCHUCK: I have seen the segment of
19 the transcript on that, but the Raven affidavit states that
20 on December 1, 1975, there was this letter from Freeman and
21 Scott. It also states that -- and the Freeman letter has
22 to do with complaining about the settlement and the way in
23 which the classes would be structured under it.

24 THE COURT: Yes.

25 MR. SCHUCK: Also, there is the inference

1 that would --

2 THE COURT: That was so short a time
3 prior to the pre-trial hearing that was scheduled for a few
4 days, not more than ten days or so forward, so I never even
5 acknowledged the matter, and only brushed through it to
6 note that there was an argument about it. Then I declined to
7 look at it any further. I would hear about it in open
8 court. Do you know of any better way for a judge to act in
9 those circumstances?

10 MR. SCHUCK: Your Honor --

11 THE COURT: I just asked you, is there
12 any better way for a judge to act than I did in those
13 circumstances?

14 MR. SCHUCK: Your Honor, you are putting
15 a question to me that I cannot answer simply because I wasn't
16 there. I wasn't involved in this thing.

17 THE COURT: You are accepting my statement
18 about it.

19 MR. SCHUCK: I am not questioning the
20 honesty of your statement in any way, Your Honor. I wasn't
21 there, and I think it is very difficult for me to try to
22 evaluate something under those circumstances.

23 THE COURT: It is the thing you are
24 relying on in your position here.

25 MR. SCHUCK: I'm relying in this respect

1 on the affidavit of Mr. Raven, which, I think, we have to
2 look at. Certainly our clients have to look at, wherein,
3 among other things, he mentions that on December 9th there
4 was a pre-trial conference at which, I think, this is what
5 Your Honor was referring to, at which there was an acknow-
6 ledgement that Mr. Ferguson had sent in to Your Honor a
7 request for some kind of a settlement schedule. The details
8 of this are attached, and Mr. Raven says that Judge Boldt,
9 at that time, acknowledged having received this document.

10 THE COURT: But he doesn't go on to say
11 that I didn't read it or pay any attention to it. And I
12 particularly called that to his attention, that that would
13 be a matter that would be resolved in open court. You are
14 a little short on information in some of this material.

15 MR. SCHUCK: Your Honor, I wasn't present
16 and I don't want to --

17 THE COURT: That is one of the things
18 that happen when you deal with one litigation, and rely
19 on another litigation without being fully informed.

20 MR. SCHUCK: Your Honor, what I have done,
21 I read the papers signed by Mr. Raven and other respected
22 counsel in connection with the submission to the multi-
23 district panel in Washington, in which they mention this
24 matter. Again, I am not going behind that, but I am going
25 to what they have said. And they have said --

1 THE COURT: I don't want to have it
2 explained any further. If you don't think that it is
3 important to have the judge's actions be considered, why,
4 of course, that is all I have to say.

5 MR. SCHUCK: I think it is important,
6 Your Honor. Look at it from the standpoint of ourselves.

7 THE COURT: Especially when it impugnes
8 the integrity of the judge.

9 MR. SCHUCK: Your Honor, look at it from
10 the standpoint of ourselves. Here we have papers filed by
11 responsible lawyers on the plaintiffs' side, Mr. Freeman
12 and Mr. Scott, and on the defendants' side, in which there
13 is a statement, if I am not wrong, at least a contention,
14 that the classes were set up in a way that coincided with
15 the Ferguson settlement.

16 Now, okay, I am not going to go into
17 a question as to whether that is factually correct or not.

18 THE COURT: It is very important to me,
19 and I want it on the record.

20 MR. SCHUCK: What is important, Your
21 Honor, is that these contentions are made by a number of
22 reputable lawyers. They are being made. They have been
23 made before the multi-district panel. These are not
24 irresponsible people. They have been made in the 9th Circuit
25 on the petition for a writ of mandamus, and I say, and I

1 think the critical inquiry -- and I know how difficult it
2 is, Your Honor, for you to accept it -- but the critical
3 issue is that these do raise a very serious question,
4 especially in face of the fact of this particular background
5 as to whether or not there may be an appearance of something
6 that shouldn't take place. And that is particularly true,
7 Your Honor, in this particular instance, where, in the
8 Sugar Opinion, Your Honor did have the statement that
9 considered the record of past multi-district anti-trust
10 litigation involving class actions, there is a substantial
11 possibility if not a probability that those cases would
12 never go to trial. Just think of how that affects the
13 client.

14 THE COURT: That is a statement of fact.
15 If you have the data, that could be readily obtained. That
16 is true.

17 MR. SCHUCK: I am asking you, Your Honor,
18 to put yourself in the position of our clients. And they
19 read that. They read about the settlement situation in
20 the sugar case. And they just do not think, under those
21 circumstances, that they are in a posture where they can
22 expect even handed treatment in this respect. And I just
23 am going to leave it right on that basis. I want to, Your
24 Honor, in that regard, invite Your Honor's attention again
25 because of the seriousness of this matter, to the comments

1 of Judge Dunaway, in the Klein case, that deals squarely
2 with this situation. It was a concurring opinion in which
3 he made this statement that "It is inconceivable to me that
4 a case can ever be tried unless the court is willing to
5 deprive each defendant of his undoubted right to have his
6 claimed liability proved, not by presumptions or assumptions
7 but by facts, with the burden of proof upon the plaintiff
8 or plaintiffs, and to offer evidence in his defense. The
9 same applies if he is found liable to proof of damages of
10 each plaintiff. I doubt that the plaintiffs' counsel
11 expect the immense and unmanageable case that they seek to
12 create to be tried, what they seek to create will become,
13 whether they intend this result or not, and overwhelmingly
14 and costly and potent an engine for the compulsion of
15 settlements, whether just or unjust, and this is the very
16 area where public confidence, public confidence in the
17 judicial system, especially as applied to these class actions,
18 has been and is being badly shaken." And when they read this
19 comment, which is that the track record of so-and-so, I
20 think Your Honor and we all can put this together.

21 Now, Your Honor, I do wish to address
22 the last question, the last specific area, and this has to
23 do with probably one of the most difficult ones. And it
24 has to do with the personal relationship between Your Honor
25 and Mr. Ferguson. And I raise this question, and we raise

1 this question in the focus of the direct attack that we are
2 going to make on Mr. Ferguson based on his admissions on
3 deposition of activities which we are going to contend, and
4 I submit, Your Honor, sincerely contend, involved in improper
5 solicitation of at least four of these lawsuits. And in
6 that regard, Your Honor, our contention is that not only
7 is this a basis for noncertification, but if it isn't going
8 to result in that, at least it is the basis for his dis-
9 qualification from acting further in these lawsuits. Now,
10 this is a sincere, a direct challenge that we are urging.
11 And I think Your Honor has to decide whether, in face of
12 your relationship that exists, whether this is a matter that
13 Your Honor can handle in an even handed manner. And I want
14 to make it also clear that this is not just something that
15 we raised after we learned that the matter had been assigned
16 to Your Honor. That testimony came many months ago. This
17 is all set out in our brief, page 59, etcetera, so the
18 challenge was there all along.

19 Now, this is a harsh position, and there
20 is no question about it, that we would be taking that
21 particular approach in relation to Mr. Ferguson's involve-
22 ment here. But we feel that that position is responsive
23 to the outrage that a responsible segment of the Bar and
24 the judiciary have with what has been thought many and many
25 responsive people to rather a cynical solicitation which so

1 often characterizes these mass class actions. I am just
2 going to refer to the deep feelings about the responsibili-
3 ties of the court in this regard that were rather pointedly
4 expressed by Judge Dunaway, who I am sure we all recognize
5 as being an outstanding jurist. He states that in
6 California, barritry is a crime. The Rule of Professional
7 Conduct of the State Bar, as authorized by the Business
8 and Professional Code, provide that a member of the State
9 Bar "shall not solicit professional employment by advertise-
10 ment or otherwise", and I might say that law is the same
11 everywhere. And he continues. "Does solicitation cease to
12 be solicitation when done under the aegis of a judge? If
13 so, what has become of the centuries old policy of the law
14 against stirring up litigation. Does the Supreme Court,
15 who adopted Rule 23, intend to aggregate that policy for
16 a case like this? I am loathed to believe that it did."

17 Now, that brings us to the crucial
18 problem as to this particular matter, whether Your Honor
19 could dispassionately and objectively rule on this challenge
20 to Mr. Ferguson. Your Honor, I personally do not know the
21 scope or the depth of the sweep of the court's friendship
22 with Mr. Ferguson. I would say if it were the kind of
23 acquaintance that I enjoy with you, or at least that I think
24 I have enjoyed with you up until the time I had to speak
25 here, and that has been a professional acquaintance. I have

1 spoken before Your Honor several times with the Board of
2 Editors of the Manual for Complex Litigation. We have
3 shaken hands, and we have said hello and maybe even had a
4 drink together at the Judicial Conference once or twice. If
5 that were it, then I don't think that is the problem. I
6 am just going to be as honest and sincere as I can. But
7 Your Honor knows, and Mr. Ferguson knows, whether that
8 relationship may be possibly more pervasive than that, and
9 whether it might get in the way of being able to deal
10 objectively, thinking not only of Mr. Ferguson, but thinking
11 also of us and our clients with this challenge that we are
12 making in this respect.

13 Now, this is where, Your Honor, I feel
14 that the reaction of my client, Mr. Dunn, in the affidavit,
15 I am sure you have read the reaction -- he expresses shock
16 that this kind of situation goes on involving the elements
17 testified to by Mr. Ferguson. And he states that therefore,
18 to add to this even the slightest possibility of not getting
19 an absolutely fair and impartial hearing would put us at a
20 serious disadvantage. And I submit that here is where the
21 appearance of total impartiality in terms of supporting the
22 administration of justice comes right to the front and center.
23 And this is also, as Your Honor has probably read, the
24 approach that was taken by Judge Houck in the case that I
25 think we cited in our brief.

1 THE COURT: I read it this morning.

2 MR. SCHUCK: Where he talks about a
3 circumspect devotion to the ideal of justice and the impor-
4 tance of exercising wise discretion, where even a question
5 of this kind is raised, whether there is biased or impar-
6 tiality or not, but under those particular circumstances,
7 it was important to him, and he did excuse himself.

8 This leads me, Your Honor, to the end
9 of what I was going to say. I again repeat that it has been
10 an extremely difficult thing for me to say these things, to
11 become involved in these matters. I have never done this
12 before. But our feeling is a deep and it is a sincere one,
13 Your Honor. And I request that Your Honor will accept that
14 as being the fact. We feel, I feel our client feels, our
15 clients feel, that they're involved in a very, very serious
16 piece of litigation. I can tell you as far as my client
17 is concerned, we are going to fight this matter. This is
18 not going to collapse on us, at least if I have anything to
19 do with it. And I don't think our clients will change,
20 either. So here we have a situation where massive, massive
21 amounts of money are going to be asserted against us,
22 claimed from us. Now, you have that situation, and if it
23 is wrong, if, under the law, it is wrong to work up this
24 massive engine of compulsion through settlements because of
25 the presence of serious individual questions, and if it is

1 wrong that they be denied the right to defend themselves,
2 then I think they are entitled to have such recourse as
3 may be at their disposal, obviously. And if, in any way in
4 relation to the challenge to Mr. Ferguson, in relation to
5 their sincere questions arising out of the settlement
6 situation, in relation to what is regarded as a disregard
7 of the 9th Circuit rulings on these critical points, there
8 is a question under 455, then I respectfully ask Your Honor
9 to recuse yourself. Thank you.

10 MR. GREENAN: Your Honor, the plaintiffs
11 were served with these papers last night after 5 o'clock
12 in the evening. So it has not been possible for us to
13 prepare anything in the way of a written response to the
14 matter. Yet, we feel we are prepared to respond to it.

15 Your Honor asked if we had any papers in
16 this matter of any other matter which the court might con-
17 sider. We did prepare and file a memorandum in opposition
18 to the motion that was brought on before Judge Neill last
19 week, and I believe in the course of the service on that we
20 had two copies delivered to your chambers. That does say
21 some of our position on this matter contained in it, Your
22 Honor. And if the court has that, fine, if not, I can
23 deliver another copy of it to Mr. Gill.

24 THE COURT: No, I do not have it. All
25 I know about that is that Judge Neill advised me that such

1 a motion had been made, that he was going to hear it, and
2 when it was concluded he would advise me of the results.

3 MR. GREENAN: Very well, Your Honor. I
4 have handed to Mr. Gill a copy of the motion we filed last
5 week in case the court feels any need to consider that.

6 Your Honor, this present motion, brought
7 under Section 455 of the Judicial Code, is mystifying to me
8 in trying to analyze just exactly what it is that the
9 defendants are saying are grounds for a reasonable charge
10 that Your Honor could not be impartial in considering the
11 matter before you in this litigation. Specifically, in
12 their affidavits and their briefs, specifically, they say
13 that there is no allegation of any personal bias or
14 prejudice on Your Honor's part; specifically, in their
15 brief, they set forth the acknowledgement that prior judicial
16 decisions in this litigation, or any other litigation, do
17 not disqualify a judge, cannot be permitted to disqualify
18 a judge. And yet they go on and say that because of the
19 opinion that Your Honor entered in the sugar case, another
20 litigation involving other facts, in which, after extensive
21 briefing and extensive argument that took several months
22 by my actual knowledge and Your Honor's actual knowledge,
23 you granted classes, that that somehow will disqualify you
24 from hearing a class action motion in another litigation,
25 involving different plaintiffs and different sets of facts.

1 Now, I don't follow that tangled rea-
2 soning. The defendants seem to be saying that because Your
3 Honor felt, in the decision in the sugar case, that the
4 reasoning of the 9th Circuit in the Hotel Charges case and
5 in Klein v. Caldwell Banker did not militate against the
6 granting of the classes, that Your Honor has somehow failed
7 to follow a direct mandate of the 9th Circuit Court of
8 Appeals, or that Your Honor is incapable of applying those
9 decisions and the other decisions of the 9th Circuit to a
10 set of facts in this case. They equate that to the reserve
11 mining situation that Judge Miles Lord was connected in
12 before the 8th Circuit, a situation where the 8th Circuit
13 specifically directed Judge Lord to do a particular thing
14 and Judge Lord did an opposite thing and refused to follow
15 that specific direction. And at that point the court said
16 we have specifically mandated you, in accordance with our
17 authority, and you, District Judge, did not follow. They
18 equate Your Honor's analysis of legal decisions of the 9th
19 Circuit to that. Lastly, in support of this motion, they
20 come up with some sort of a vague feeling, because of some
21 sort of a personal relationship, which Mr. Schuck has just
22 mentioned he knows nothing about, between Your Honor and
23 Mr. Ferguson, that you would be unable to impartially
24 consider a matter in which Mr. Ferguson is involved, parti-
25 cularly when they feel that they are going to have to make,

1 and will make some charges concerning Mr. Ferguson's
2 activities in this litigation.

3 Now, let me tell you what I am not going
4 to do in this motion, Your Honor. I am not going to take
5 a half an hour. I am not going to, at this point, argue
6 the relationship of Telephone or Klein, or the subsequent
7 decision of Blackie v. Barrett to this litigation. We are
8 prepared to go into those at length and depth in the course
9 of the class action motion as to how they affect this liti-
10 gation. Nor am I going to touch upon Mr. Ferguson's alleged
11 activities as set forth by the defendants in their opposition
12 to the class action motion or Mr. Ferguson's relationship
13 with the various clients who are the plaintiffs in this
14 action. That, too, we are prepared to discuss at length and
15 in depth when the class action motion comes. What I would
16 like to do, Your Honor, is talk to you about the law that
17 has been set forth by the court in considering this section
18 of the Judicial Code, Section 455A and a sister section,
19 Section 144.

20 Now, one can only speculate, I suppose,
21 why the motion before Your Honor is brought under Section
22 455. That speculation probably being the admission that
23 they were required to make of no personal bias or prejudice
24 and therefore they would fly into the clearer, direct
25 language of Section 144, which talks about the disqualifica-

1 tion of a judge for bias and prejudice. Section 455A was
2 amended in 1974. It wasn't amended materially, to change
3 the ground for disqualification. The grounds have always
4 been whether or not a judge can be impartial in a particular
5 matter. It was amended so that the basis was not whether
6 or not in the judge's subjective opinion he could be im-
7 partial, but whether or not there were reasonable grounds
8 to determine whether the judge was impartial. Of course,
9 they have held that this is an objective standard.

10 Now, as I say, that was a 1974 amendment.
11 So there is a paucity of law following that amendment as to
12 how it relates to the former statute and how it relates to
13 Section 144. Nevertheless, there are some cases which we
14 were able to find through our reading last night and this
15 morning, which I would like to quote to Your Honor.
16 Specifically, the 5th Circuit in a case entitled Davis v.
17 Board of School Commissioners of Mobile County, Alabama.
18 517 F.2d. 1044, a 1975 decision had this to say about
19 Section 455 and its interrelationship with Section 144,
20 the bias and prejudice section. By the way, I will give
21 these books to Mr. Gill when I have finished.

22 The court quotes the same portion of
23 the statute that the defendants quote in their brief, and
24 then on page 1052 of the decision, they say this,

25 "The quoted language supra in Section

1 455 is new to the Federal Law of Disqualifi-
2 cation. And we must determine whether Congress
3 intended to overrule the gloss which was
4 placed on Section 144 and impliedly on Section
5 455 by court decisions that it applies only
6 to conduct which runs against the party and not
7 the lawyer, citing cases. And that disquali-
8 fication results from extra judicial conduct
9 rather than matters arising in a judicial
10 contest."

11 In citing other cases. We find no
12 other suggestion in the legislative history that these
13 decisions were being overruled or otherwise eroded. The
14 new language was designed to substitute the reasonable fact-
15 ual basis, reasonable man test in determined disqualification
16 for the subjective "in the opinion of the judge" tests used
17 in the prior amendment. It was also intended to overrule
18 the so-called Duty To Sit Decision. The use of sound,
19 judicial discretion test continues to obtain an appellate
20 review. Construing Section 144, again, that is the personal
21 bias and prejudice section, and Section 455, where there are
22 reasonable grounds for the judge to be impartial, in pare
23 materia. We believe that the test is the same under both.
24 We thus hold that an Appellate Court in passing on questions
25 of disqualification of the type here presented should deter-

1 mine the disqualification on the basis of conduct which
2 shows bias or prejudice or lack of impartiality by focusing
3 on a party rather than counsel. The determination should
4 be made on the basis of conduct extra judicial in nature
5 as distinguished from conduct within a judicial context.
6 This means we give Sections 144 or 455 the same meaning
7 legally for these purposes, whether, for the purposes of
8 bias and prejudice or when impartiality of a judge might
9 be reasonably questioned. And here, referring to the case
10 we were discussing, we have judicial activity towards
11 lawyers and nothing else. And thus, the results under
12 Sections 144 and 455 considered separately and together is
13 that we find no error. That is the end of the citation from
14 there, Your Honor question in a District Court case, United
15 States on the relation of Mattox v. Finkbeiner, in 389 F.
16 Supp. 1040 -- excuse me, Your Honor. I have given Your
17 Honor the wrong citation. The name of the case is Lazosky
18 v. The Somerset Bus Company, Incorporated, from the eastern
19 district of New York, decided February 27, 1975. Here the
20 court said that,

21 "The court has also considered
22 the recently amended paragraph A of Section
23 455 entitled 28 of U.S. Code, even though the
24 same was not urged upon it by the plaintiff or
25 her counsel."

1 This follows a discussion of Section 144
2 by the court.

3 "The court has also considered
4 Canon Two of the ABA Code of Judicial Conduct,
5 which requires judges to avoid impropriety
6 and the appearance of impropriety. If the
7 words 'impartiality' might reasonably be
8 questioned and avoid impropriety and the
9 appearance of impropriety were to be inter-
10 preted to encompass judicial rulings in the
11 course of a trial or other proceedings as the
12 plaintiff counsel seemingly suggests herein,
13 then there would be almost no limit to judicial
14 disqualification motions, and the way would
15 be open to a return to judge shopping, a
16 practice which has been for the most part
17 universally condemned. Certainly every ruling
18 on an arguable point during a proceeding may
19 give the appearance of partiality in the
20 broadest sense of those terms to one party or
21 the other. Neither the American Bar Associa-
22 tion nor Congress has yet indicated that the
23 laws should be so construed nor have they yet
24 prescribed that parties should be given one or
25 more preemptory charges with respect to judges."

1 That quotation was from page 1044 of
2 that decision. And finally, Your Honor, one last case that
3 I think bears upon this and in which we were able to locate
4 in the limited amount of time that we had available is a
5 case entitled Samuels v. University of Pittsburgh, decided
6 on June 6, 1975, appearing in 395 F. Supp. 1275, and I
7 suppose it's of interest, Your Honor, that this case follows
8 the decision of the Judicial Panel in the sugar industry
9 litigation assigning that litigation to Your Honor. It
10 follows it in the book. This is what the court has to say
11 concerning Section 455:

12 "Unless it was the intention
13 of Congress that only ciphers be appointed to
14 the Federal Bench, an absurd theory, the
15 expression of opinion on legal matters is
16 certainly permitted. Federal judges give,
17 indeed, are usually invited to give, their
18 views in many different formal and informal
19 situations. Almost invariably those views
20 bear some relation to litigation which has
21 been or will be before them. That counsel
22 disagrees with the judge's opinion so
23 expressed cannot be grounds for disqualifi-
24 cation."

25 The definitive opinion on the permissible

1 expression of a federal judge's personal philosophy, is the
2 case of Commonwealth of Pennsylvania v. Local 542. The
3 citation to that case. Beyond noting that the 1973 state-
4 ments which counsel has taken issue with, prior statements
5 in a different litigation could not have concerned attorneys
6 fees in this case because the counsel's petition for such
7 fees had not been filed until March of 1975. There is little
8 that I can add to Judge Higgenbottom's comprehensive
9 discussion of the subject.

10 Now, Your Honor, in the memorandum that
11 we filed in front of Judge Neill, on the hearing that was
12 considered last Friday, we cited cases -- that is that one,
13 Your Honor, and parenthetically I may say, Your Honor, that
14 I had an opportunity to appear on the 8th Circuit on a
15 matter such as this about three years ago, and so I have had
16 the opportunity to do some rather extensive briefing on
17 Section 144 and the basis for disqualification under that
18 statute. As we have seen this morning, there are some
19 marked similarities between the court's treatment of the
20 two sections. The Supreme Court of the United States has
21 said when a judge determines upon a consideration of an
22 appropriate affidavit, that indeed there is a showing of
23 bias and prejudice, it is his duty to disqualify himself. When
24 the fact set forth in that affidavit -- and again, this is
25 the Supreme Court speaking in the Tynan case and in the

1 American Steel Bureau case, when a judge determines that
2 those facts do not support it, it is his duty to deny the
3 motion, not something that the judge can do because it may
4 please counsel or that it may get him out of a tight situation,
5 or that it may feel, may make a particular class feel more
6 comfortable in front of that judge. Judge shopping is not
7 permitted in the federal courts. It is the duty of the
8 court to deny such motions, to deny to litigants in this
9 litigation and litigants in future litigations that would
10 cease upon this precedent to use against another judge. It
11 is the court's duty if he does not find grounds to deny
12 such a motion and to not allow litigants in the federal
13 courts to have that type of sledge hammer, if you will, or
14 meat axe, to use over judges. Truly, that is the only way
15 that it can be. Mr. Dunn, in his affidavit, Your Honor,
16 expresses shock, as Mr. Schuck describes it, because of
17 what Mr. Schuck told him concerning Mr. Ferguson's relation-
18 ships with Your Honor, and concerning Mr. Ferguson's
19 involvement in this litigation. And yet Mr. Schuck says he
20 knows nothing of Your Honor's relationship with Mr.
21 Ferguson.

22 THE COURT: I was just going to inquire
23 about that. What does he know about that subject?

24 MR. GREENAN: I don't know, Your Honor.
25 Perhaps you would have to ask Mr. Schuck. He said this

1 morning, I think, that he knew nothing about the length and
2 the breadth and the depth and so forth of that relationship.
3 Without going into a relationship between two individuals
4 which I am sure is not greatly different than the relation-
5 ship that lawyers have to lawyers and judges have to lawyers
6 throughout the country in our jurisdictions and otherwise,
7 I would just like to point out, Your Honor, just from the
8 track record in the past, that Mr. Ferguson, the firm of
9 Ferguson and Burdell, has absolutely no reason to feel
10 complacent before Your Honor when we appear in anti-trust
11 litigation or any other litigation. I think the record
12 will show that in the Forks Fire case, that was before Your
13 Honor many years ago, that Mr. Ferguson felt compelled, or
14 at least he did, appeal from decisions which Your Honor
15 made in that case on at least three separate occasions,
16 sometimes reversing Your Honor and sometimes not. Ferguson
17 and Burdell in what we consider to be a major case that
18 involved the reputation of our firm at the time, spent a
19 great deal of time appearing before Your Honor in the
20 defense of Mr. Dave Beck, Mr. Beck was convicted and sen-
21 tenced by Your Honor. And we were unable to do much about
22 that even, by the appeal process to the United States
23 Supreme Court. In the Asphalt litigation Your Honor will
24 recall that we asked you for a governmental class in that
25 litigation for all of the west coast states that were in-

1 volved. And Your Honor refused to allow such a class,
2 holding in those circumstances that permissive intervention
3 was the way to go, and denied the class. And that Western
4 Liquid Asphalt litigation proceeded from that point on,
5 as some of the counsel in this room are well aware, on the
6 basis of intervention and joined there. They would argue
7 that we should feel complacent with the decision that Your
8 Honor came forth with in sugar, and yet in that decision,
9 Your Honor, the State of Washington and the other states
10 were denied a class of consumers on the basis of a finding
11 by Your Honor under the facts of the sugar litigation that
12 the claims of the state were not typical in that instance
13 with the claims of the consumers which they purported to
14 represent. Now, we feel that we will be able to persuade
15 Your Honor to persuade any court that the typicality of
16 the situation which Your Honor concedes in sugar is peculiar
17 to sugar, and it is not something that is related to
18 fertilizer. That again is an argument that I would be
19 prepared, and others would be prepared to address themselves
20 to in the course of the discussion of the class action
21 motion. Your Honor, that is all that I am prepared to say
22 on this matter. I strongly state that it is the duty of
23 this court, out of respect for the functioning of the
24 federal courts and out of a concern for other judges in
25 other litigations to rule that under no circumstances,

1 conjecture or otherwise, have the defendants come forward
2 with anything that could be genuinely be said to be reason-
3 able grounds for a finding that Your Honor would be impartial
4 in this matter. And therefore, that motion made under
5 Section 455 has to be denied. Thank you, Your Honor.

6 MR. SCHUCK: May it please the court,
7 getting to the matter of what I know and do not know about
8 the personal relationship, it is not correct, and I did not
9 say, as Mr. Greenan said I said, that I know nothing about
10 the relationship. I do know there is a relationship between
11 Your Honor and Mr. Ferguson. It is rather general know-
12 ledge that I am aware of. What I said was that I don't
13 know the depth or the scope or the breadth of it. And I
14 have only two things to say about that. One, I know Your
15 Honor is a very conscientious person, and Your Honor knows
16 what that relationship is and whether or not it gets in the
17 way. The second point, and since Mr. Greenan says so much
18 about a record in this matter, I think probably we have no
19 other alternative in this matter but to possibly develop
20 a record, and on that basis, maybe this motion should not
21 be disposed of right now until we can take depositions of
22 the appropriate people and explore that matter, if this is
23 what the opposition feels is necessary that we are deficient
24 in a record. But I think when we are talking to a judge as
25 experienced and as respected as Your Honor, Your Honor can

1 search your own heart and Your Honor can know whether that
2 relationship is something that would get in the way of the
3 direct, personal challenge that we are asserting with
4 respect to Mr. Ferguson.

5 Now, a question is made and raised as to
6 why we proceeded under 455A and not under 144. We can only
7 speculate as to why we didn't go under 144. Section 144
8 calls for personal bias and prejudice. And what has happened
9 is where the 1974 amendment, there has been a great broaden-
10 ing of the scope of the whole matter of disqualification of
11 judges. It is made mandatory for reasonable question of
12 impartiality is raised, which is a far broader standard and
13 which Your Honor sets aside all of the cases cited by Mr.
14 Greenan and that earlier brief that was filed. They are
15 all Section 144 cases that came up before the 1974 amendment,
16 with the single exception of the Oliver case, and that was
17 a case that came under 144. They are not addressing the
18 critical section, which is 455. And while we are on 455,
19 I turn to the legislative history, which was referred to,
20 I think, in our brief, in which it states that the broad-
21 ening of the disqualification grounds states that this
22 general standard is designed to promote public confidence
23 in the impartiality of the judicial process by saying, in
24 effect, if there is a reasonable factual basis for doubting
25 that judge's impartiality, he should disqualify himself and

1 let another judge preside over the matter. Then it says,
2 addressing another point that Mr. Greenan had mentioned.
3 The language also has the effect of removing the so-called
4 duty to sit, which has become a gloss on the existing
5 statute. No matter what the Davis case may say, or what
6 that other old decision that Mr. Greenan has referred to
7 may say about the duty of the judge to sit regardless and
8 pluck it on through, that has been changed by 455. And
9 Your Honor, I wish to refer to the most recent expression
10 on 455, which they don't mention, which is the 10th Circuit
11 decision in the Ritter case, where the matter came up on
12 a challenge by the government to the defense counsel on
13 the ground that the defense counsel had acted on the Bar
14 Committee, which presided over proceedings which involved
15 Judge Ritter during the troubled times that I am sure we
16 are all aware of. And the contention is made that because
17 of that relationship and also because that lawyer had
18 delivered copies of the Bar Association's resolutions to
19 Judge Ritter, that that was enough to invoke 455A. What
20 the 10th Circuit said just a month ago was,

21 "The language of Section 455
22 allows a greater flexibility in determining
23 whether disqualification is warranted and
24 in particular situations."

25 And then distinguishing the Davis case

1 upon which Mr. Greenan relies, said that moreover, the
2 section applies in the case of bias in favor of or against
3 an attorney which can certainly result in bias towards the
4 party. In other words, the Davis case separates, it didn't
5 extend to situations where there might be an attorney-judge
6 relationship. Then the court said that the final question,
7 and that which disturbs us the most, is whether in light
8 of the total facts, and they are the facts that I have
9 mentioned earlier, in viewing the future of this case in
10 the light of Section 455A, there exists reasonable likelihood
11 that the cause will be tried with the impartiality that
12 litigants have a right to expect from the United States
13 District Courts. He said unfortunately, we cannot predict
14 that it will be. And therefore, we can conclude in the
15 interest of justice, that this case should be tried by
16 another judge. And those are the tests that should be
17 applied, and on that basis, I submit the argument.

18 MR. GREENAN: I would like to ask the
19 court's permission to supplement the record in this matter
20 to the extent that it need be supplemented by appropriate
21 portions of the transcript that Mr. Raven referred to in
22 his affidavit, so whatever other court may look at this,
23 to whatever extent they may find it interesting or necessary,
24 they will have before them the complete record and Your
25 Honor's statements and activities in sugar in connection

1 with this matter.

2 Secondly, and finally, Your Honor, I have
3 not had the opportunity to read the Ritter case, so I can't
4 comment on the 10th Circuit decision there other than to
5 say I am sure Your Honor is aware that Judge Ritter has a
6 long standing track record of disagreements, shall we say,
7 with the 10th Circuit, such that that circuit, and the United
8 States Supreme Court on three other occasions that I am
9 aware of, have felt it necessary to either ask Judge Ritter
10 to step down from a case or tell him that he must do it.
11 It occurred in the Navaho Indian problem and one other that
12 doesn't come to mind at the moment. Thank you.

13 THE COURT: You are given leave, and I
14 request that you do supplement this record as you suggested,
15 Mr. Greenan, because I am quite confident that the matter
16 as presented by the defendants in the sugar litigation has
17 omitted a good deal of transcript that ought to be also
18 included.

19 MR. GREENAN: Thank you, Your Honor.

20 THE COURT: That is at least my memory
21 of it. And will you please do that, as I say, regardless
22 of the result of this proceeding.

23 A little background that only Judge Neill
24 or I can give, should be stated. As some of you know,
25 the eastern district of Washington is shorthanded because

1 of the death of Judge Goodwin the last day of last year
2 suddenly on the tennis court. His obligation to sit in
3 this district at least half the time of course, terminated
4 with him, and to this day, although there have been candi-
5 dates proposed for the position, as yet Congress has not
6 acted, and it would appear they are not likely to act very
7 soon. Whenever election day is, that is more likely to be
8 the time, and even then a long time after that. In any
9 event, all the federal judges in busy districts are over-
10 worked and overwhelmed with litigation, but Judge Neill is
11 more than normally so because we cannot provide assistance
12 from the western district to any significant extent because
13 judges in that district all need help they can get from
14 other districts. Thus it was no great surprise to me when I
15 was asked to come over here and hear this motion. I was very
16 reluctant to do so because I am carrying as heavy a load in
17 various areas of litigation, as I have throughout my years
18 on the bench.

19 Yet, I felt an obligation to this district
20 because I have had a standing assignment to Spokane all
21 through the years. I have often come over here and tried
22 cases when the judges over here needed help. I finally
23 consented to conduct this hearing because Marshall Neill
24 has been a long time friend of mine, for whom I have a very
25 warm friendship, and I am sure it is reciprocated. Because

1 he needed help, I came here today. But I made it sharp
2 and clear I was coming only for the purpose of hearing the
3 class action motion, and that I could not make a commitment
4 to do anything further than that in this fertilizer liti-
5 gation, unless some now unexpected miracles occurred to
6 relieve me of some of the litigation I am now conducting.
7 I came as a reluctant volunteer, and it is a little
8 distressing to find that my qualifications to sit at this
9 proceeding are so vigorously and vehemently denied. I have
10 no doubt concerning the integrity of the counsel who assert
11 them or the sincerity of their views, but I don't agree
12 with them.

13 I think a few details of the matters
14 pertaining to the proposed settlements in the sugar litiga-
15 tion should be put on the record. The first I heard of
16 the proposed settlements is when Mr. Ferguson telephoned
17 me and said that some proposed settlements had been nego-
18 tiated with three defendants, I believe, and that he wanted
19 to do whatever might be appropriate to move forward to some
20 action on those proposed settlements. I said to him that,
21 of course, I did not want to have any information from him
22 or anyone else concerning the details of the negotiations,
23 but that I thought that he might appropriately lodge the
24 material under seal with the Clerk. I thought it best that
25 he bring the matter up at the forthcoming pre-trial confer-

1 once, which this morning I checked and found was on the 9th
2 of December, 1976. The Freeman letter, which I received,
3 I think was dated the 26th, so I must have gotten it
4 several days later. I happen to know Lee Freeman quite
5 well, and his forceful style in presenting his contentions
6 I am not unacquainted with. I glanced through his letter
7 just enough to see that he was much incensed about the
8 matter. I didn't feel it necessary to drop him a note or
9 anything else because when counsel arrived the morning of
10 the pre-trial conference I made it plain that he would be,
11 would have leave to speak on this subject when the time
12 came. It was a rather warm and heated dissertation between
13 the counsel. But the net result was that the material was
14 lodged under seal as I had suggested, and that is all that
15 I acquired in the way of information about the settlements
16 at that time. After all, I have been at this business long
17 enough to know that when a motion for class action is
18 pending, nothing should be done in the way of a hearing on
19 settlements until such time as the class action is deter-
20 mined, either one way or the other. If granted, the notice
21 must be given to all the class members with full opportunity
22 for the class to object or resist settlement, and that in a
23 case of that magnitude, it would require very extensive
24 expert testimony to determine whether or not this settlement
25 was fair and reasonable under all the particular circum-

1 stances. I have gone through that routine several times,
2 and I am well familiar with it.

3 Now, to make out of that some sort of
4 misconduct on my part is really beyond my understanding. I
5 am not aware of any impropriety of any kind whatever in
6 connection with those proposed settlements. I must often
7 have made mistakes or misunderstandings. I am occasionally
8 reminded of it by reversals. But as far as doing something
9 that was injudicial or improper, I deny it categorically
10 and without reservation. If I ever had been so disposed, I
11 surely wouldn't be now when I am so near to having to make
12 the final accounting on high or below, which ever it turns
13 out to be. I have given my utmost effort for all these
14 years. Many, many times, far above and beyond the call of
15 duty. I think it is known by all who know me, favorably
16 or otherwise. It would break my heart to have it bruited
17 about in the legal profession that I had intentionally done
18 something I should not have done.

19 Now, a word or two about Mr. Ferguson
20 and our relationship. I have known Bill Ferguson since he
21 came to Seattle from Spokane, wasn't it?

22 MR. FERGUSON: Bellingham.

23 THE COURT: Bellingham. We were about
24 the same age and we had many donnybrooks against each other
25 in litigation. I formed a high opinion of him then, and

1 that still remains. I think he feels the same for me. But
2 as far as having any other relationship, such as financial --
3 we have a couple of times gone to a football game with our
4 wives, usually we have along someone else on the other side,
5 if there is any litigation pending, so that no one will
6 take any false impression from it. That is the extent of
7 our relationship. If there is anything improper in that,
8 make the best of it, because it is no closer a relationship
9 than I have with a great many other lawyers all over the
10 country. Most of my friends are lawyers and I have never
11 before had one of them seek to have me recuse myself in
12 their litigation. I have had in a number of criminal cases,
13 received the suggestion that I wouldn't be a good judge to
14 have on the case. Only one time ever that I had to grant
15 such an application and I did it on my own motion because
16 I remembered one time when I was in the practice that this
17 particular gentleman had been involved in some very
18 questionable activities and so, when that was called to my
19 attention -- it was years earlier, but he apparently
20 remembered it. But his counsel told me about it, then I
21 remembered it, too, and I recused myself. As far as I can
22 remember now, I can't give any other times. Maybe there
23 were some, but they have escaped my memory, but there has
24 always got to be a first time, and I suppose if you live
25 long enough, and this may be it. I don't think so. I don't

1 think there is a showing justifying me to withdraw from
2 this litigation.

3 However, Judge Neill returned this
4 morning from judicial work in San Francisco, I believe. I
5 called him to find out if he was going to be here today,
6 and he said he would be. He told me in the telephone
7 conversation that he had had a heavy calendar of criminal
8 cases that were scheduled to start this week, and that
9 happily for him, considering the loaded docket over here,
10 they had had pleas in all of the cases. That is rather
11 extraordinary nowadays, incidently. Guilty pleas are
12 becoming less and less common all the time. I suppose if
13 I were in the criminal practice I would rejoice in that,
14 but that is the way it is.

15 So he is available here to conduct this
16 motion, and I have decided to let him do it. But I make
17 it plain that I am not acknowledging that I am required to
18 do it. I am doing it because he is now available and can
19 hear this motion. In view of the strong feelings that
20 have been expressed here today, I will voluntarily bow
21 out of this particular proceeding. But should it turn out
22 at some future time that Chief Judge Neill would request
23 me to take over this litigation, I would feel that there
24 was no reason why I should not do so. I don't presently
25 contemplate doing that, but such a situation might arise,

1 and I want it plain on the record that I deny that there is
2 any reason why I should not continue with this motion as
3 well as any other features in this case that might be
4 assigned to me.

5 So ordered.

6 My Law Clerk asks if I should write a
7 written opinion on the matter and whether or not I am
8 satisfied the record made extemporaneously is adequate. The
9 answer is yes, it is. I do not think it is necessary to
10 enter any formal order. A minute order will be satisfac-
11 tory with me unless some of you wish to embellish the
12 decision and if you wish to do so, on either side, please
13 feel free to do so.

14 MR. SCHUCK: We have no interest in
15 embellishing it, Your Honor.

16 MR. GREENAN: Your Honor, in the interest
17 of what might happen perhaps years from now in other
18 litigation, can we have an understanding on the record that
19 Your Honor has denied the motion brought by the defendants
20 under 455 and is voluntarily stepping down?

21 THE COURT: That is what I intended to
22 do. If you want to have a short piece of paper to that
23 effect, get it done today and I will sign it while we are
24 having a recess. Get together on it, and we will put it
25 down for posterity.

1 Well, we part in friendship. I want you
2 all to be my friends as long as I live, and I hope that you
3 will never get near feeling otherwise. Incidentally, one
4 thing I neglected to mention, and perhaps I should have to
5 this extent. Counsel continually forget one of the most
6 basic propositions stated in Rule 23; namely, that if the
7 judge certifies a class action he is free at any time and
8 in any manner he chooses to modify the class action or
9 terminate it entirely, or continue it only in certain
10 aspects and respects. It is a function of Federal District
11 Judges to improvise new and better ways of dealing with
12 litigation. It has been the duty of the District Judges
13 since the founding of the Republic. They didn't get very
14 far with it for awhile, but pretty soon they did. And
15 they have ever since. And when the day comes that they are
16 not free to do that, it will be very bad for the judiciary
17 in this country. What is stated in certifying the class
18 action, the one that you read from, does not in any manner
19 whatever mean that necessarily everything that is stated
20 in that order will be put into effect. Surely on such
21 basic matters as the type you have referred to, when the
22 time comes to resolve what the issues in the case are, by
23 final pre-trial order, if not earlier, those matters will
24 be amply briefed and argued in extensis. If I am wrong
25 about any of the statements I have put in the sugar order,

1 counsel on both sides will have an opportunity to tell me
2 so and seek correction. If they are as horrendous as you
3 seem to think on the defendant's side, I would think
4 that the circuit court will knock out those things that are
5 not appropriate, maybe knock out the whole class action for
6 all I know. You know, those fellows are liable to do
7 anything, and we all must take it in good grace. You are
8 not much of a lawyer if you can't take a licking with some
9 degree of composure after the first few minutes when you
10 get out and raise hell in the corridor with the judge and
11 everybody else. But that is good for the soul, to exhaust
12 extreme steam a little. I will have to confess, being a
13 trial lawyer all my life, I frequently took that measure.
14 But I quickly forgot about it because I was too busy with
15 the next case. And I suspect most of you are in the same
16 boat.

17 And now, the best to all of you until
18 we meet again.

19 (THE COURT WAS THEREUPON
20 ADJOURNED.)
21
22
23
24
25

FREEMAN, FREEMAN & SALZMAN

ATTORNEYS AND COUNSELLORS AT LAW

SUITE 3200

ONE IBM PLAZA

CHICAGO, ILLINOIS 60611

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LARRY H. SPECTOR

OF COUNSEL
JOHN F. BOLTON, JR.

AREA CODE 312
TELEPHONE 467-6540

November 26, 1975

Honorable Judge George H. Boldt
United States District Court
P.O. Box 1993
Tacoma, Washington 98401

In re: Sugar Antitrust Litigation
Master File No. 201 (N.D. Cal.)

Dear Judge Boldt:

A serious situation has arisen in the Multi-district Sugar Antitrust Litigation which in our judgment requires your attention in order to prevent current settlement negotiation activities from disrupting constructive development of the proceedings.

The background of the problem: A 6 man Executive Committee was designated by the 19 man Steering Committee to supervise and give direction to the progress of this multi-district litigation. This 6 man committee consists of Messrs Harold E. Kohn, Perry Goldberg and Joseph L. Alioto, who represent industrial users solely and seek to represent industrial class members; Messrs Wm. H. Ferguson and Maxwell M. Blecher, who represent specified plaintiffs only, without seeking class representation; and Richard N. Light, Assistant Attorney General of California, who seeks to represent a public entity class in California.

This committee has been besieged by requests of various defendants to settle their cases across the board.

No classes have as yet been certified and no class representatives designated. As you know, the move toward determination of class action motions has gone forward rapidly, a reasonable schedule for the filing of briefs has been directed and oral arguments on the class questions are scheduled for presentation to the Court on December 9, 1975.

EXHIBIT D

FREEMAN, FREEMAN & SALZMAN

Honorable Judge George H. Boldt
November 26, 1975
Page Two

Despite the absence of designated class representatives, the Executive Committee negotiated a settlement with Holly Sugar for \$5 million based upon a refund of 1-1/4% of Holly's sales during a four year period. No reasonable determination of the range of overcharges was made as a predicate to the Holly settlement. We do not at this time quarrel with the adequacy and reasonableness of the amount of the Holly settlement, indeed, there is not sufficient data now available to make an informed judgment, but we do strenuously object to the form and conditions of that settlement since it deliberately seeks to prejudice the position of state attorneys general who now, or shortly intend to, seek certification of consumer classes. We believe state attorneys general would join with us on this position.

The Holly settlement provides for the establishment for settlement purposes only of four classes in each of the three markets covering the periods from 1949 or 1955 to date, as follows:

1. Industrial users broadly defined as anyone who directly or indirectly purchased refined sugar for use or manufacture by restaurants, hospitals, vending machine operators and manufacturers of ice-cream, dairy products, beverages, wines, beer, confectionary, canned, bottled and frozen foods, bakery goods, cereal, animal feed, etc. etc.
2. Retail grocers who directly or indirectly purchased refined sugar and had gross annual sales of \$150,000 or more.
3. Governmental entities.
4. Wholesalers who directly or indirectly purchased refined sugar for resale.

Specifically and deliberately excluded from any class specification are consumers. The Holly settlement is conditioned to provide that either party may withdraw from the agreement if a consumer class is certified for litigation purposes and Holly may withdraw if the Court should certify settlement classes which are narrower than those defined.

The Holly settlement thus preempts the Court's function of defining and certifying classes on the basis of the submission of proper data. It serves to grossly prejudice the

Honorable Judge George H. Boldt
November 26, 1975
Page Three

position of the proposed consumer classes by imposing improper pressures on the Court to reject that class and give priority recognition to the wholesalers and retail grocers classes as a means of preserving the settlement. On the basis of our investigation the wholesalers and retail grocers legally are not entitled to an allocation from the settlement, since their practice is to add-on a percentage or dollar and cents mark-up to the conspiratorial prices fixed by the refiners, thus passing the injuries and damages on to the consumer. The same is true to a lesser extent of industrial users.

The obvious impropriety of this form of settlement agreement was pointed out to the Executive Committee and we requested that submission of the settlement to the Court for approval be withheld until the class action motions had been acted upon by the Court. However, on November 17th a letter from the Committee was received which said in part:

"[T]he Executive Committee was faced with a situation where we would have to turn down the Holly settlement as insufficient if a consumer class were to be included for settlement purposes, and we felt that in the long run the rejection of the Holly offer would be detrimental to the interests of all of the plaintiffs."

Thus, the inadequacy of the settlement was conceded. It is my understanding that Holly in making its settlement offer proposed that the consumers be included, but the industrial user representatives on the committee succeeded in excluding consumers presumably as a means of securing larger amounts for their clients and class members.

The situation has developed further. Two additional settlements have been tentatively approved by some members of the Executive Committee and recommended for approval by the Steering Committee and ultimately the Court. These two settlements are to include the same improper provisions and conditions usurping judicial class action determinations and excluding consumers.

Furthermore, aside from the negotiations conducted by the Executive Committee, as such, private negotiations have been conducted by individuals behind the back of the Executive Committee. We understand that Committee is dominated by counsel representing industrial users who have determined the course of negotiations and the conditions of settlement agreements in a manner that threatens to disrupt the effectiveness and leadership of the Chairman.

Honorable George H. Boldt
November 26, 1975
Page Four

We are concerned that continuation of negotiations (a) prior to judicial certification of classes (b) involving the attempted establishment of classes for settlement purposes only (c) seeking preferential position for classes who may not possess a legal basis of participation and (d) excluding a class entirely -- is improper and contrary to announced judicial decisions and the strong suggestions contained in the Manual for Complex Litigation, Section 1.46 -- with which this Court is intimately familiar.

The Manual suggests that the following inquiries might be pursued by the Court in considering the reasonableness and fairness of a proposed settlement of class actions.

"(1) At what stage in the proceedings was the proposed settlement achieved?

(2) Has there been any development of facts through discovery or otherwise on which estimates of the probability of liability and the range of possible damages can be made?

(3) Can the proponents of the settlement submit data to establish at least preliminarily the reasonableness of the proposed settlement?

(4) Who were the negotiating parties and to what extent were they authorized to proceed with the settlement of their class claims and possibly those of other classes?

(5) Did all counsel for all parties participate in the negotiations and, if not, what are the views of the nonparticipating parties and counsel?

(6) If the proposed settlement relates to only one of a number of classes, what effect will it have on the claims of the other classes?"

Further, the Manual stresses that "experience to date leads to the conclusion that tentative classes for the purposes of settlement . . . should never be formed."

Applying these suggested inquiries to these proceedings, the proposed settlements were achieved before facts were developed through discovery or otherwise on which estimates of the probability of liability and the range of possible damages could be made. In fact the undersigned is co-chairman of the Discovery Committee and has begun an active discovery program with the participation of many plaintiffs' counsel.

Honorable Judge George H. Boldt
November 26, 1975
Page Five

Secondly, the negotiating parties are not class representatives. The Manual wisely points out:

"Care should be taken to avoid undesirable premature unauthorized settlement negotiations in class actions. Before any settlement negotiations occur, there should be a class action determination. Thereafter, all settlement negotiations on behalf of the class should be conducted by counsel representing the class in the litigation."

The dangers of settlements negotiated prior to class representative designation was reviewed in Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971 - the plumbing litigation).

Finally, in considering how the settlement would affect the "claims of other classes" the Court is met with the fact that the Holly and two additional settlements now being formularized contemplate possible improper allocations to wholesalers and retail grocers and exclude the consumers, the parties directly injured.

Again the Manual pertinently advises:

"The apportionment of the total proposed settlement among the several classes requires reliable economic data on which a finding of injury and damages to each class can be based. And there may be cases in which some of the plaintiff classes not only were not damaged but may have profited as a result of the illegal practices. . . . In this connection it should be noted that the interest most likely to be adversely affected by the absence of reliable economic data in a civil antitrust treble damage action, for instance, is the consumer interest which it is the policy of the law to protect. Further, the consumer is ordinarily the person who has the least means and motive to engage in and vigorously prosecute complex litigation. So the court must be particularly sensitive to the need of the consumer class for reliable economic data to protect its interest."


The situation above described is such that it requires your Honor's intervention in this multi-district complex litigation to take control of the proceedings and direct

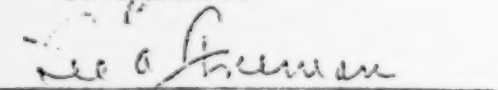
Honorable George H. Boldt
November 26, 1975
Page Six

- a) the suspension of settlement negotiations until class actions have been certified and class representatives designated,
- b) the rejection of class designations for settlement purposes only,
- c) the continuation of discovery in an efficient manner, and
- d) the selection of a committee of counsel consisting of class representatives and the Chairman of the Executive Committee and coordinating counsel to conduct settlement negotiations under proper circumstances.

We submit due process requires that the state attorneys general should have an initial fair and reasonable opportunity to establish their consumer classes and seek allocations of any settlement fund rather than suffer a preemption of that position prior to judicial consideration.

Respectfully submitted,


WILLIAM J. SCOTT
Attorney General
of Illinois


LEE A. FREEMAN
Special Assistant
Attorney General

LAF:do
cc: To All Counsel

The agreement of the non-settling defendants with respect to the form of proposed Pretrial Order No. 12 and three proposed forms of class notice should not be construed as such defendants' agreement that notice to the classes should go out at this time, or that there is any basis in the record of these proceedings for the findings embodied in proposed Pretrial Order No. 12. The non-settling defendants believe the Court's consideration at this time of matters relating to class notice is premature and further believe that any attempt to provide notice to the classes of the existence and status of these proceedings, including the proposed partial settlement, is impracticable and improvident in view of the many uncertainties which presently exist. The non-settling defendants have expressed this position to the Court in the Objections By Certain Defendants To The Submission Of Proposed Forms Of Class Notice And Proposed Settlement Agreements, served August 4 and filed August 6, 1976, the Objections By Certain Defendants To Plaintiffs' Proposed Forms Of Class Notice, served July 23 and lodged August 16, 1976, and in argument to the Court on August 16 and 17, 1976. The non-settling defendants have taken and continue to take this position for the following reasons, among others:

1. New developments in proceedings before the Judicial Panel on Multidistrict Litigation, now set for hearing on October 1, 1976, may materially affect the determination of class actions in these proceedings;
2. The Court's ability to remain impartial in determining matters of vital concern to the non-settling defendants has been and will continue to be further jeopardized by the Court's knowledge concerning terms of the proposed partial settlement;
3. Any notice of the proposed partial settlement is inadequate if it fails to describe the allocation of settlement funds among and within classes;
4. The Court has received insufficient facts to authorize submission of the proposed partial settlement to absent class members;
5. The class notices cannot adequately apprise class members of the nature of these proceedings in light of pending motions to make defendants Imperial Sugar Company and Sucrest Corporation additional defendants subject to the class certification order;

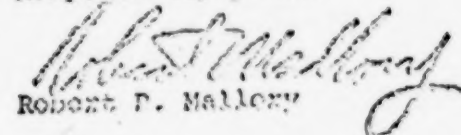
6. Confusion and increased costs will result when class notices must be amended or superseded due to subsequent developments which can be anticipated presently;

7. The Court has improperly delegated to plaintiffs' counsel responsibility to ensure compliance with Rule 23, Federal Rules of Civil Procedure, concerning the forms of class notice and manner of their dissemination; and

8. The dissemination of notice to class members at this time is impracticable in the face of new developments and uncertainties which now exist in these proceedings, and there is no countervailing urgency for such dissemination.

At the conclusion of the pretrial hearing on August 17, 1976, plaintiffs, by William H. Ferguson, Esq., requested that the defendants consider revising the schedule established by Paragraph 5 of the Order Modifying Class Action Order dated May 20, 1976, filed August 16, 1976, to reduce the periods set forth on page 6 thereof as follows: 30 days to 10 days (line 7); 10 days to 5 days (line 20); and 10 days to 5 days (line 28). The non-settling defendants have no objection to these proposed modifications.

Respectfully yours,


Robert F. Mallory

cc: Josef D. Cooper, Esq.
[sent by telecopier]
William H. Ferguson, Esq.
All Defense Counsel

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11
12 IN RE SUGAR ANTITRUST LITIGATION)
13)

14 THIS DOCUMENT RELATES TO:

MASTER FILE
MDL-201

15 ALL ACTIONS)
16)

17 AFFIDAVIT OF ROBERT D. RAVEN
18

19 STATE OF CALIFORNIA)

20 CITY AND COUNTY OF SAN FRANCISCO)

ss.

21
22 I, ROBERT D. RAVEN, being first duly sworn, depose
23 and say:

24 1. I am a member of the State Bar of California
25 and one of the attorneys of record for Amstar Corporation,
26 a defendant herein. Since December 9, 1976, James F. Kirkham
27 and I have served as defendants' co-coordinating counsel in
28 these proceedings. I submit this affidavit in support of
29 this motion to disqualify the Honorable George H. Boldt from
30 further participation in this litigation.

1 2. On November 4, 1975, during the pendency of
2 the submission of briefs on plaintiffs' motion for class
3 certification, counsel for Holly Sugar Company ("Holly")
4 advised me that Holly had negotiated a settlement with
5 representatives of Plaintiffs' Steering Committee, in the
6 sum of \$5 million. Shortly thereafter, I learned that
7 California and Hawaiian Sugar Company ("C&H") negotiated a
8 settlement with members of the Plaintiffs' Steering Committee,
9 in the amount of \$16.5 million.

10 3. On or about November 24, 1975, counsel for
11 Holly informed me that Judge Boldt had been advised of the
12 amount of the Holly settlement prior to the issuance of a
13 press release by Holly on or about November 10.

14 4. On December 1, 1975, during the pendency of
15 motions for class certification, I received a copy of a
16 letter to the Honorable George H. Boldt dated November 26,
17 1975 from William J. Scott and Lee A. Freeman, attorneys
18 for the State of Illinois, in which they advised Judge
19 Boldt of the details of proposed settlements negotiated by
20 members of Plaintiffs' Steering Committee with Holly, and two
21 other defendants in these proceedings. The letter specifically
22 advised the Judge that the proposed settlements were conditioned
23 on the Court's not certifying consumer classes proposed by
24 certain states and questioned the propriety of such settlements
25 being considered during the pendency of class certification
26 proceedings.

27 5. On December 9, 1975, immediately before the
28 commencement of a pretrial conference, Judge Boldt requested
29 a conference of liaison counsel in chambers. Mr. Bomse
30 appeared for the settling defendants, and Mr. Kirkham

1 and I appeared on behalf of the litigating defendants.
2 Mr. Kohn and Mr. Ferguson appeared on behalf of plaintiffs.
3 The Judge commenced the discussion by asking whether there
4 was "anything he should know" about pending matters.

5 6. Receiving no reply the Judge explained that as
6 a consequence of an airline strike and extensive flooding in
7 the Seattle-Tacoma area, he was unable to arrive in San
8 Francisco until late on December 8. Judge Boldt then
9 acknowledged having received a document entitled "Request for
10 Establishment of Schedule for Consideration of Proposed
11 Settlements," to which there was attached a copy of a
12 "Stipulation and Agreement of Settlement" which purported
13 to memorialize the terms of the proposed settlement between
14 the Plaintiffs' Steering Committee and Holly Sugar Company.
15 These documents confirmed that the proposed settlement was
16 conditioned on the Court's certification of certain classes
17 and its denial of consumer classes proposed by various states.

18 7. Following Judge Boldt's statements, Mr. Kirkham
19 or I asked him whether he had received Mr. Freeman's letter of
20 November 26, which had itself disclosed certain details of
21 the proposed settlements. The Judge responded that he had
22 received Mr. Freeman's letter and had considered a detailed
23 response, but concluded that such a response would be
24 "inappropriate." The Judge further said he also considered
25 simply acknowledging receipt of Mr. Freeman's letter but
26 concluded that such a response might be offensive to "such
27 an old friend as Mr. Freeman."

28 8. I expressed defendants' concern that dis-
29 closure by plaintiffs of the terms and conditions of the
30 proposed settlements had compromised the Court's ability to

1 determine impartially pending motions for class certification.
2 Judge Boldt gave his assurance that he would not be affected
3 by his knowledge of the proposed settlements in deciding
4 pending motions for class certification.

5 9. The Court's statements and the discussion that
6 followed between the Court and counsel in chambers, which
7 included extended argument by Mr. Kohn against the propriety
8 of the consumer classes which Messrs. Freeman and Scott had
9 urged in their letter, were all predicated on the understanding
10 that the Court had read the Freeman letter and was aware of
11 the substance of the pending settlements and the conditions
12 upon which their viability depended. Subsequent to the
13 in-chambers conference, the conditions attendant to the
14 settlements were disclosed by plaintiffs at the pretrial
15 conference and numerous discussions occurred on the
16 record. See e.g., December 10, 1975 Hearing, Tr. at 68-71,
17 86-89, 177-85, 188-200; May 24, 1976 Hearing, Tr. at 69-71.

18 10. Several days after the Pretrial Conference
19 I learned that arrangements had been made during the last
20 few days of November or the first few days of December, 1975,
21 for certain representatives of Plaintiffs' Steering Committee
22 and counsel for the "settling defendants" to meet with Judge
23 Boldt in Tacoma on December 5 ostensibly to further advise
24 the Judge of the details of the settlements and to obtain
25 his "tentative approval." I learned further that Judge
26 Boldt had agreed to schedule the meeting. Finally, I learned
27 that it had been cancelled on or about December 2 at the instance
28 of one of plaintiffs' counsel who had raised questions
29 concerning the propriety of such a meeting with the Judge.

30 11. Prior to receiving the aforementioned information

1 concerning the proposed Tacoma conference which had purportedly
2 been scheduled for December 5, I had no knowledge whatsoever
3 that such a conference had been planned. To the best of
4 my knowledge, counsel for the non-settling defendants had
5 never been given notice of such a meeting, nor had they
6 previously been informed that it had been scheduled. Further-
7 more, at no time during either the in-chambers conference of
8 December 9 or during the Pretrial Conference, at which the
9 issue of Judge Boldt's knowledge of the settlements had been
10 extensively discussed, did Judge Boldt or any of the attorneys
11 present disclose the fact that such a meeting had been
12 scheduled between the Court and the "settling parties."
13 12. As a consequence of this newly acquired information,
14 counsel for defendants felt it imperative to further discuss
15 with Judge Boldt the possible impact of his knowledge of the
16 terms of the proposed settlements on the class determination
17 issue and to disclose their fears that the record has been
18 seriously tainted by virtue of his knowledge. After much
19 thought and deliberation, counsel for the "non-settling"
20 defendants concluded that Judge Boldt could not properly
21 render a decision on the class action issue without a serious
22 appearance of impropriety, and decided to ask Judge Boldt to
23 confine his further duties to reviewing the fairness of the
24 proposed settlements and to make arrangements for the litigation
25 to be assigned to another judge for all other purposes.
26 13. Arrangements were made for representatives of
27 plaintiffs and defendants to confer with Judge Boldt in chambers
28 in Tacoma on December 22, 1975 to discuss defendants' position.
29 At this conference with Judge Boldt I expressed defendants'
30 concern that disclosure by plaintiffs of the terms and conditions

1 of the proposed settlements had compromised the Court's
2 ability impartially to determine pending motions for class
3 certification.

4 14. The Court listened to defendants' proposal,
5 indicated that he would not so confine his responsibilities
6 at that time, but said that he would give the proposal further
7 consideration. The Court represented to the non-settling
8 defendants that he would not be influenced in any respect
9 by the tentative settlements.

10 15. On May 24, 1976, the Court issued its Opinion
11 and Order re Class Certification in which it certified classes
12 which are in accord with those conditions provided for
13 in the settlement agreements.

14 16. Based on all the circumstances surrounding
15 this litigation, I firmly am convinced that my client cannot
16 obtain a fair and impartial hearing from Judge Boldt and that
17 there are reasonable grounds for the belief that the Court's
18 impartiality might be questioned.

19 *Robert C. Bowen*
20
21

22 Subscribed and sworn to
23 before me this 15 day of
October, 1976.

24 *Veronica Marshall*
25
26 Notary Public
27 State of California



CERTIFICATE OF GOOD FAITH

ROBERT D. RAVEN hereby certifies:

That he is a member of the State Bar of California
and one of the attorneys of record for Amstar Corporation,
a defendant in these proceedings.

That he has read the attached Affidavit of
John C. Reynolds in support of this motion to disqualify
the Honorable George H. Boldt from further participation
in this litigation.

That such Affidavit was executed in good faith
by John C. Reynolds on behalf of Amstar Corporation.

Dated: October 15th, 1976.


ROBERT D. RAVEN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION }

THIS DOCUMENT RELATES TO:

MASTER FILE
MDL-201

ALL ACTIONS }

AFFIDAVIT OF MARC P. FAIRMAN

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) ss.

I, MARC P. FAIRMAN, being first duly sworn, depose
and say:

1. I am a member of the Bar of the State of
California and one of the attorneys of record for Amstar
Corporation, a defendant herein. Since August 30, 1973, I
was an attorney of record for the Spreckels Sugar Division
of Amstar Corporation in 1812 Distributing Corp., et al. v.
Utah-Idaho Sugar Company, et al., No. 633-7202 (W.D. Wash.).
In that capacity, I coordinated the defense of such action

1 with Peter D. Byrnes of the firm of Bogle & Gates, who
2 served as co-counsel on behalf of Amstar.

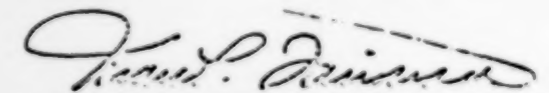
3 2. By order of June 2, 1975, the Judicial Panel
4 on Multidistrict Litigation ordered various of the within
5 actions transferred to the Northern District of California
6 for coordinated or consolidated pretrial proceedings before
7 the Honorable George H. Boldt. The 1812 action which contained
8 claims similar to those contained in certain of the trans-
9 ferred actions was not subject to the Panel's Order.

10 3. Subsequent to the Panel's Order, Judge Boldt,
11 by memorandum of June 9, 1975, requested that counsel in
12 each of the pending sugar actions prepare a joint status
13 report summarizing prior procedures and rulings therein. In
14 addition, the Court set a pretrial conference for July 8, 1975
15 and requested that counsel in the 1812 action attend and
16 participate in such conference.

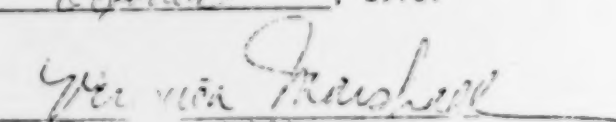
17 4. Subsequent to receiving Judge Boldt's memorandum,
18 Mr. Byrnes and I commenced discussions with Mr. Ferguson and
19 other attorneys in his office concerning the status of the
20 1812 action and, specifically, whether such action would be
21 appropriate for transfer to the Northern District of California
22 and consolidation with other pending sugar litigation. Among
23 the alternatives discussed was the advisability of the parties
24 in the 1812 action moving the Judicial Panel on Multidistrict
25 Litigation to vacate its Order with respect to those of the
26 previously consolidated actions which were patterned after
27 the 1812 case. In addition, Mr. Byrnes and I discussed with
28 Mr. Ferguson and others in his office the information which
29 should be contained in the status report required by Judge
30 Boldt's memorandum of June 9.

1 5. During the period of such discussions, which
2 occurred between June 12, 1975 and June 27, 1975, the date
3 upon which the Joint Status Report in the 1812 action was
4 served, Mr. Ferguson and others in his office advised Mr.
5 Byrnes and me that they opposed^{ed} transfer of the 1812 action
6 to the Northern District of California and also opposed moving
7 the Judicial Panel on Multidistrict Litigation to vacate its
8 Order with respect to those actions patterned after the 1812
9 case which had been previously consolidated before Judge Boldt.
10 Mr. Ferguson and others in his office expressed concern that
11 either such disposition would retard the progress of the 1812
12 action toward trial and thereby be prejudicial to his clients'
13 interests.

14 6. As a consequence of the foregoing discussions
15 with Mr. Ferguson and other attorneys in his office during
16 the latter part of June, 1975, I clearly understood that Mr.
17 Ferguson would oppose the transfer of the 1812 action to the
18 Northern District of California and its consolidation with
19 other pending sugar proceedings should such a proposal be made
20 during the pretrial conference scheduled for July 8, 1975.

21 
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25 Subscribed and sworn to
26 before me this 15 day of
27 October, 1976.

28 
29 Notary Public
30 State of California



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION)

THIS DOCUMENT RELATES TO:

MASTER FILE
MDL-201

ALL ACTIONS)

AFFIDAVIT OF JOHN C. REYNOLDS

STATE OF NEW YORK)
CITY AND COUNTY OF NEW YORK) ss.

I, JOHN C. REYNOLDS, being first duly sworn, depose
and say:

1. I am Vice President and General Counsel of
Amstar Corporation. In this capacity, I am Amstar's chief
lawyer, and, as such, I have responsibility for the general
supervision of all legal affairs of the Corporation.

2. As part of my responsibilities, I have closely
followed the Sugar Antitrust Litigation which is consolidated
in the Northern District of California. Counsel of record
for Amstar (hereinafter "counsel") have kept me currently
informed of all significant developments throughout these
proceedings.

3. In November, 1975, I was informed by counsel
that Holly Sugar Company had negotiated a tentative settle-
ment with certain plaintiffs. Shortly thereafter, I was
further informed that California and Hawaiian Sugar Company
and the Union Sugar Division of Consolidated Foods Corpora-
tion had also negotiated tentative settlements.

4. Shortly after having been informed of these
settlements, counsel informed me that such settlements were
conditioned on the certification by the Court of certain
classes and the non-certification by the Court of other
classes as to which motions for class certification had been
filed. Counsel further informed me that such conditions had
been disclosed to Judge Boldt by a letter dated December 5,
1975, from Messrs. Freeman and Scott, counsel for plaintiff
State of Illinois, and that a copy of the Holly Settlement
Agreement containing such conditions had been provided by
the plaintiff to the Court.

5. On December 9 and 10, 1975, a pretrial confer-
ence was held before Judge Boldt at which time matters per-
taining to class certification were argued. Subsequent to
the hearing, counsel advised me that Judge Boldt had met
with certain of the attorneys for plaintiffs and defendants
in-chambers prior to the pretrial conference and acknowl-
edged receipt of the letter from Messrs. Freeman and Scott
and acknowledged having received a copy of the Settlement
Agreement. Counsel further advised me that there occurred
both in-chambers and, subsequently, on the record of the

December 9 and 10 he ring, an extended discussion of the nature and conditions of the tentative settlements and their possible impact on pending motions for class certification. Counsel advised me that he had expressed concern on behalf of Amstar Corporation that the Court might be improperly influenced by its knowledge of the conditions upon which the viability of the settlements depended, but that Judge Boldt had assured counsel that he would not be so influenced.

6. Shortly after the pretrial conference of December 9 and 10, counsel informed me that he had received information to the effect that prior to the pretrial conference attorneys representing the settling parties had scheduled a hearing with Judge Boldt ostensibly to obtain his approval of the proposed settlements. I was told that counsel for Amstar Corporation had not previously been advised of the pendency of such a hearing, either by the settling parties or by the Court. I was particularly concerned that the Court had not previously disclosed that such a hearing had been scheduled notwithstanding the extended discussions which took place both in-chambers and on the record concerning possible impact of the settlement disclosures on motions for class certification which were pending before the Court.

7. As a consequence of the foregoing disclosure, I again expressed concern to counsel that Judge Boldt might have been improperly influenced in deciding pending motions for class certification by virtue of his knowledge of the

contents of the Settlements Agreements, and, in particular, that the viability of the settlements was conditioned on certain classes, but not others, being certified by the Court. I concluded that a serious impropriety would result if Judge Boldt were to decide motions for class certification possessing knowledge of the terms of the settlements. Consequently, after much thought and deliberation, I concurred with counsel that Judge Boldt be requested to confine his further participation in the litigation to matters relating to the proposed settlements and to arrange for all other matters to be assigned to another judge.

8. Counsel for Amstar and for other of the non-settling defendants met with Judge Boldt and counsel representing plaintiffs to advise him of our concern that he could not continue to determine motions for class certification both because of his knowledge of the terms of the settlements and the previously undisclosed efforts by plaintiffs to obtain his approval of such settlements. Following the meeting, I was advised by counsel that Judge Boldt had assured all present at the meeting that he would not be influenced by the proposed settlements. I was further informed that while Judge Boldt refused to confine his responsibilities to matters pertaining to settlement at that time, he would take defendants' proposal under consideration.

9. On May 20, 1976, the Court issued an Opinion and Order Re Class Action, a copy of which I reviewed. The

Court's order certified classes consistent with the conditions set forth in the settlements which had previously been brought to Judge Boldt's attention. After having reviewed the opinion, I again expressed my concern to counsel that Judge Boldt, notwithstanding his assurances to the contrary, had been influenced in certifying classes because of his knowledge of the terms upon which the settlements were conditioned. I authorized counsel to pursue all available means for review of the class certification opinion by the Court of Appeals.

10. In or about the last week of August, 1976, I reviewed the Response of Amstar Corporation to Order to Show Cause and in Support of Coordinated Inter-District Proceedings which had been filed on Amstar's behalf before the Judicial Panel on Multidistrict Litigation on August 27. Amstar's Response discussed, among other things, Judge Boldt's knowledge of the terms of the proposed settlements. I noted in reviewing the document that such discussion comported with my understanding of the nature and extent of Judge Boldt's knowledge concerning such settlements.

11. Immediately following my review of Amstar's filing with the Judicial Panel on Multidistrict Litigation, I reviewed a Minute Order issued by Judge Boldt on August 25, 1976, in which he stated that he "had not learned the contents of the settlements in any manner whatever." Judge Boldt's statement was in direct contradiction of the understanding which I had had since at least December 9, 1975,

that he had known about the pertinent details of the proposed settlements, as clearly reflected in the transcripts of pretrial conferences which I had reviewed.

12. Following my review of Judge Boldt's Minute Order of August 25, 1976, I expressed to counsel my dismay that the Court would issue a statement that directly contradicted the record concerning its knowledge of the salient terms of the proposed settlements. I advised counsel that as a consequence I had become convinced that a serious impropriety had occurred.

13. Thereafter, I received a copy of a transcript of a hearing in the Northwest Fertilizer case (Master File No. MF-75-1), in which Judge Boldt again denied any knowledge of the contents of the settlement agreements which had been negotiated in the sugar litigation. In addition, Judge Boldt stated that he had had the settlement papers which had been provided to him by plaintiffs in the sugar litigation "sealed and lodged under seal" and that "the material was lodged under seal" as he had suggested. I have been informed by counsel that the disclosure on the record of the fertilizer hearing was the first indication that the proposed settlement papers had been filed under seal, and that a subsequent review of the files of the Clerk of the Court disclosed that the Holly Settlement Agreement had been filed on December 3, 1975, but, contrary to Judge Boldt's assertion, had neither been lodged under seal nor ultimately sealed.

14. In reading the transcript of the fertilizer hearing, I also learned for the first time of an ex parte

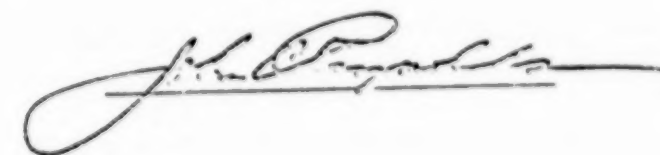
communication between William H. Ferguson, Chairman of Plaintiffs' Steering Committee, and Judge Boldt during which the settlements in the sugar litigation were apparently discussed. To the best of my knowledge and information, the ex parte communication between Judge Boldt and Mr. Ferguson occurred without the knowledge or consent of counsel for Amstar or of counsel for the other defendants who are not parties to the settlements.

15. From the outset of these proceedings, ex parte communications between Mr. Ferguson and Judge Boldt had been reported to me by counsel. I referred above to one such communication in which arrangements were apparently made for a hearing before Judge Boldt to obtain his tentative approval of the proposed settlements. I was advised that another ex parte communication took place subsequent to the signing of Pretrial Order No. 2 at which time Mr. Ferguson ostensibly delivered such order to Judge Boldt and discussed contested issues with him without the knowledge or consent of defense counsel. When defense counsel learned of the latter communication, they advised Mr. Ferguson by letter dated August 21, 1975, that they objected to such ex parte communications. Notwithstanding such objections, I am informed and believe that other such ex parte communications between Mr. Ferguson and Judge Boldt concerning contested matters in this litigation have occurred.


16. By virtue of the Court's knowledge of the terms of the settlements negotiated with certain of the plaintiffs, the apparent impact which such knowledge had on its class certification decision, its repeated denials of

such knowledge notwithstanding that such denials are wholly contradicted by the record, and the continuing ex parte communications between the Court and Mr. Ferguson, I am convinced that this Court has a personal bias against Amstar and in favor of the plaintiffs or their counsel.

17. The Sugar Antitrust Litigation is an outgrowth of indictments against several sugar companies. Following a two-year grand jury investigation in which it was a respondent, Amstar was neither indicted nor named in any government civil action. Amstar is convinced of its innocence of any wrongdoing and believes such innocence can be established before a fair and impartial tribunal. At the very least, it is entitled to the opportunity to defend itself before such a tribunal. I believe, and hereby affirm my belief, that, in light of the events in this action detailed above, Amstar cannot receive a fair and impartial hearing before Judge Boldt.



Subscribed and sworn to
before me this 14th day
of October, 1976.


Notary Public
City of New York
County of New York
No. 24-4663229
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

United States District Court for the
Northern District of California

IN RE SUGAR ANTITRUST LITIGATION

Master File

No. MDL201

THIS DOCUMENT RELATES TO ALL ACTIONS

AFFIDAVIT OF JAMES F. KIRKHAM IN SUPPORT

OF MOTION TO RECUSE THE HONORABLE

GEORGE H. BOLDT

State of California,)
City and County of San Francisco.) ss.

I, JAMES F. KIRKHAM, being first duly sworn,
depose and say:

1. I am admitted to practice before the United
States District Court for the Northern District of California,
the Court of Appeals for the Ninth Circuit, and the Supreme
Court of the United States, and am one of the counsel of
record for U AND I INCORPORATED ("U-I"), a defendant in the
litigation above noted. Since December 1975 I have served
with Robert D. Raven as co-liaison counsel for defendants.

2. Prior to December 1975, Stephen D. Bomse of
Heller, Ehrman, White & McAuliffe, counsel for the Union
Sugar Division of Consolidated Foods, served as liaison
counsel for defendants. Mr. Bomse is no longer liaison
counsel for defendants because in November, 1975, his client
reached a tentative settlement agreement with certain plain-
tiffs in this litigation. Mr. Bomse related the facts in
paragraphs 3 and 4 to defense counsel in my presence and I
believe those facts to be true:

3. Following the first pretrial conference in
July 1975, during Mr. Bomse's tenure as liaison counsel, the
Court ordered the parties to attempt to agree upon the form
of Pretrial Order No. 1. In accordance with the Court's
directive, counsel for the parties met following the con-
ference to draft Pretrial Order No. 1 and reached agreement
on the form of that order. On July 28, 1975, Mr. Bomse was
asked by Mr. Ferguson, who was in San Francisco to attend
the Ninth Circuit Judicial Conference, to meet at the
Fairmont Hotel (where Mr. Ferguson was staying) with Judge
Boldt and Mr. Cooper, liaison counsel for plaintiffs, for
the purpose of having Pretrial Order No. 1 signed.

4. Mr. Bomse went to Mr. Ferguson's room at the
Fairmont Hotel and found Mr. Ferguson with Judge Boldt. The
Court had signed Pretrial Order No. 1, which included Part
XIII, concerning the parties' steering committees. No
attorney had been designated Chairman of Plaintiffs' Steer-
ing Committee on the form of order submitted by the parties
to the Court. However, when Mr. Bomse arrived at the
meeting Judge Boldt advised Mr. Bomse that it was necessary
to have a Chairman of each Steering Committee and that
Mr. Ferguson would be Chairman of Plaintiffs' Steering Com-
mittee. Thereafter, the order already having been signed,
and Mr. Ferguson designated as Chairman of Plaintiffs'
Steering Committee, Mr. Cooper arrived at the hotel room.
Mr. Bomse assumed at the time that plaintiffs' counsel had
agreed among themselves that Mr. Ferguson would be the
chairman of Plaintiffs' Steering Committee. Later that day,
however, Mr. Cooper inquired of Mr. Bomse as to the circum-
stances under which Mr. Ferguson had been designated by

1 Judge Boldt as "Chairman," inasmuch as this had not been
2 expressly agreed upon by plaintiffs' counsel.

3 5. Mr. Robert D. Raven, co-liaison counsel with
4 me in the litigation above noted, related the following
5 facts to defense counsel in my presence and I believe these
6 facts to be true: On the evening of July 7, 1975, Mr. Robert D.
7 Raven and Mr. Peter Byrnes, counsel of record for Amstar
8 Corporation, met with Mr. Ferguson in the Fairmont Hotel.
9 Mr. Raven said that the meeting was arranged because he
10 wished to ascertain what position Mr. Ferguson would take
11 with respect to consolidation of the 1812 action with the
12 other sugar cases previously consolidated by the Judicial
13 Panel on Multidistrict Litigation in San Francisco. In that
14 meeting Mr. Ferguson told Mr. Raven and Mr. Byrnes that he
15 now favored consolidation of the 1812 case because "they
16 have made me an offer I can't refuse." In the same conversa-
17 tion Mr. Ferguson told Messrs. Raven and Byrnes that "the
18 Judge wants the 1812 case consolidated."

19 6. On the morning of December 9, 1975, prior to
20 a pretrial conference in the case above noted, I attended a
21 conference in chambers with, among others, Robert D. Raven,
22 Esq., William H. Ferguson, Esq., Josef D. Cooper, Esq.,
23 Harold Kohn, Esq. and Judge George H. Boldt. Judge Boldt
24 had in hand a letter from Mr. Freeman dated November 26,
25 1975, a true copy of which is Exhibit A hereto. Judge Boldt
26 said he had received the letter. Judge Boldt laughed and
27 said words to the effect that the letter was written in
28 typical Freeman style, that the arguments presented in the
29 letter were presented flamboyantly. Judge Boldt said words
30 to the effect that he had not answered the letter and did

1 not intend to answer it since in view of the contents all he
2 could possibly say under the circumstances was: "Your
3 letter of so and so date received" and he would not want to
4 give such a curt reply to an old friend like Mr. Freeman.
5 The discussion of the Freeman letter lead to a discussion
6 between Judge Boldt, Mr. Ferguson and Mr. Kohn whether, as
7 advocated by Mr. Freeman, all consumer classes which were
8 the subject of the Freeman letter, Exhibit A, should be
9 certified.

10 7. From his comments about the style, content
11 and the subject matter of the Freeman letter, and from his
12 demeanor in general with respect to that letter Judge Boldt
13 made clear that he had read and understood the contents
14 thereof.

15 8. On December 22, 1975, Mr. Raven and I went to
16 Tacoma, Washington, to attend a conference with Judge Boldt
17 and counsel for plaintiffs. Defense counsel had arranged
18 the conference for the purpose of requesting Judge Boldt to
19 refrain from further participation in the litigated cases,
20 including the class action determination, and to become the
21 settling judge.

22 9. Prior to the meeting with the Court, we met
23 with Peter D. Byrnes, Esq., Washington counsel for Amstar,
24 and William H. Ferguson, Esq., Josef D. Cooper, Esq. and
25 Albert R. Malanca, Esq., counsel for plaintiffs. We ex-
26 plained to plaintiffs' counsel that defendants were con-
27 cerned because the conditional nature of the settlements had
28 been explained to the Court by counsel for certain plaintiffs
29 and that this knowledge might influence the Court's class
30 action determination. Mr. Ferguson stated that Judge Boldt

1 was told about the Holly settlement because Holly's S.E.C.
2 counsel had insisted that the \$1 million settlement be made
3 public immediately. Mr. Ferguson stated that he believed
4 the Court should be personally informed of the settlement
5 rather than reading it in the newspaper and that he told the
6 Court only what was in the newspaper article and nothing
7 more.

8 10. I was also counsel for U-I in the 1812
9 litigation (1812 Distributing Corporation, et al. v. Utah-
10 Idaho Sugar Company, et al. (Civil No. 633-7202) W. District
11 of Washington), before that action was consolidated with the
12 proceedings in MDL201 by Judge Boldt at the first pretrial
13 conference on July 8, 1975, and have had responsibility for
14 that litigation since September 1974. My partner, William
15 Mussman, had previously been responsible for that litigation.

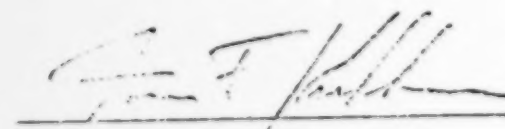
16 11. There was a conference before Judge Boldt on
17 August 22, 1973, shortly after Judge Boldt was assigned to
18 that case, which Mr. Mussman attended. Thereafter there
19 were no hearings whatsoever until April 8, 1975, over 18
20 months later, when the judge held a pretrial conference. At
21 the pretrial conference I was surprised to hear Judge Boldt
22 say as follows:

23 "I must say they [counsel for the parties]
24 have displayed a degree of responsibility and a
25 cooperative attitude that is really most commend-
26 able, the result of which has been that we have
27 never had a formal pretrial conference. That is
28 apparently why you labeled this one the first.
29 But we have quite a number of comparatively short
30 hearings on particular procedural matters that

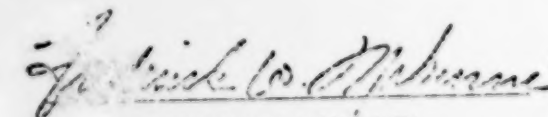
1 mean a lot of time as the cases were along. If
2 there is any inference that there was a delay or a
3 lack of pushing forward, at least from the time
4 the case was assigned to me that is not correct."
5 (Transcript of April 8, 1975, pp. 21-22) (emphasis
6 added).

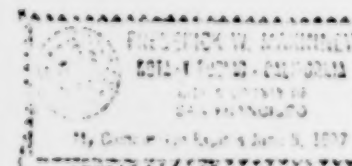
7 12. There were no such hearings at which defense
8 counsel were present to my knowledge, and no hearings of
9 which U-I or its counsel had any knowledge or which U-I's
10 counsel attended.

11 13. This affidavit and the affidavit of John M.
12 Wunderli on behalf of U and I Incorporated are submitted in
13 good faith. The motion to recuse Judge Boldt is made in
14 good faith.

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James F. Kirkham

21 Subscribed and sworn to
22 before me this 18th day
23 of October, 1976.

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FREDERICK W. HUMPHREY
NOTARY PUBLIC
State of California



UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

Master File
No. MDL-201

THIS DOCUMENT RELATES TO ALL ACTIONS

AFFIDAVIT OF JOHN M. WUNDERLI IN SUPPORT
OF MOTION TO RECUSE THE HONORABLE
GEORGE H. BOLDT

STATE OF UTAH }
COUNTY OF SALT LAKE } ss.

I, JOHN M. WUNDERLI, being first duly sworn, depose and say:

1. I am Director of Legal Affairs for U and I Incorporated (hereinafter "U-I"), a defendant in several of the actions consolidated for pretrial proceedings in the Northern District of California before the Honorable George H. Boldt. I am a member of the Bar of the State of Utah, entitled to practice before the highest courts of that State and also the United States District Court for the State of Utah.

2. It is part of my responsibilities to become familiar with all litigation involving U-I and to assist outside counsel in coordinating the company's litigation efforts. I came with U-I and assumed those responsibilities in June 1975. In connection with these responsibilities, I have become familiar with the conduct of U-I's defense of the consolidated sugar cases and the rulings of the Court on various matters in those cases.

3. I have read the Petition for Mandamus and accompanying Memorandum of Points and Authorities filed with the Ninth Circuit Court of Appeals on behalf of U-I and certain co-defendants and the memoranda filed by counsel for Amstar and Great Western with the Judicial Panel on Multi-district Litigation. In addition, I have reviewed the transcripts of the December 9 and 10, 1975, and August 16 and 17, 1976, hearings before Judge Boldt and the September 9, 1976, transcript of the hearing before Judge Boldt in the Northwest Fertilizer Cases (Master File No. MF-75-1). The factual statements made herein are based upon my review of those documents and upon representations of counsel for U-I and counsel for other defendants.

4. I was advised by counsel for U-I when certain of the defendants in these cases settled in November and December of 1975. I was distressed to learn that on December 5, 1975, plaintiffs filed with the Court a copy of the Holly settlement and the contents of the settlements and their conditional nature had been fully explained to the Court in a letter dated November 26, 1975, from Mr. Freeman and Mr. Scott, counsel for plaintiff State of Illinois.

5. In December 1975 defendants were concerned with the fact that Judge Boldt had been tainted by his knowledge of the conditional nature of the settlement agreements. Counsel for all defendants seriously considered in December of 1975 whether a motion should be filed to disqualify the Judge and this subject was discussed with U-I's officers by counsel for U-I. Although no formal motion was filed, U-I joined in the request made by the nonsettling defendants in December 1975 that Judge Boldt become the settling judge and that another judge be assigned to continue with this litigation and rule upon the class action determination. Judge Boldt declined defendants'

request stating that he would consider the class action motion and then decide whether he should become the settling judge. He assured the non-settling defendants that he would not be influenced in any manner by the tentative settlements.

6. On May 20, 1976, the Court issued its class action order. That order--which in my view is in important respects directly contrary to the law of the Ninth Circuit--conforms the litigating classes to the classes in the settlement agreements which had previously been presented to the Court.

7. Notwithstanding the letter from Mr. Freeman and Mr. Scott and the related events described above, the Court now takes the position that it did not obtain any knowledge of the settlement agreements. The defendants first learned that the Court would categorically deny any knowledge of the settlements when they received the Court's minute order dated August 25, 1976, wherein it states that "the Court had not learned the contents of the settlements in any manner whatever." Further, on September 20, 1976, the defendants obtained a copy of the transcript of the hearing on defendants' motion to recuse Judge Boldt in the Fertilizer cases (Northwest Fertilizer Cases (Master File No. MF-75-1)), where the Court again states that it did not obtain any knowledge of the settlement agreements. The Court's statements concerning its knowledge of the terms of the settlements are contrary to the record as I understand it. Moreover, the Court at that hearing stated that the settlements were lodged with the Clerk under seal (September 9, 1976 Hearing, Tr. 45-46). I am informed that a review of the files shows that the original Holly settlement was filed on December 5, 1975, and that it is not filed under seal.

8. I believe that the Court's knowledge of the tentative settlements improperly influenced its class action decision and caused it to certify the classes requested by certain plaintiffs and to rule against defendants on this issue. The Court's attempted and repeated denials of its knowledge of the settlements, which denials I believe are belied by the record, confirm my belief that the Court is biased against defendants and in favor of plaintiffs.

9. Further, I am advised that Judge Boldt and Mr. Ferguson have had ex parte conferences concerning matters directly related to this case. The first occurred sometime prior to July 8, 1975, when the action entitled 1812 Distributing Corp., et al. v. Utah-Idaho Sugar Company, et al. (C75-1129 G.H.B.), originally pending before Judge Boldt in the Western District of Washington, was consolidated with the sugar cases consolidated in MDL-201. On the evening of July 7, 1975 Mr. William H. Ferguson, now Chairman of Plaintiffs' Steering Committee and counsel of record for plaintiffs in 1812, told Mr. Robert D. Raven and Mr. Peter Byrnes that Judge Boldt wanted 1812 consolidated with the other actions. The second such conference occurred in Mr. Ferguson's room at the Fairmont on July 24, 1975, at or before which time Judge Boldt apparently appointed Mr. Ferguson Chairman of Plaintiffs' Steering Committee. The third occurred on August 18, 1975, when Mr. Ferguson delivered Pretrial Order No. 2 to the Judge and they discussed the scheduling of proceedings in this litigation. Finally, even after defendants had expressed their written objections to such conferences, in November 1975, Mr. Ferguson discussed the proposed settlements with Judge Boldt by telephone prior to the Court's ruling on plaintiffs' motions for class certification. This telephone

conference, which occurred some time prior to the scheduled December 9, 1975, oral argument on the class action motion, involved Mr. Ferguson's desire which he expressed to the Court "to move forward to some action on those proposed settlements" (September 9, 1976, Hearing, Tr. 45). This conference, and the extent of Mr. Ferguson's discussions with the Court, was admitted by Judge Boldt for the first time at the hearing in the Fertilizer cases (September 9, 1976, Hearing, Tr. 45). Each of these ex parte conferences occurred without the knowledge and consent of counsel for the nonsettling defendants. The Court's willingness to meet ex parte with Mr. Ferguson to discuss matters directly relating to the conduct of this litigation demonstrates a bias in favor of Mr. Ferguson and his clients, and I believe that U-I cannot receive a fair and impartial hearing before Judge Boldt. I believe, moreover, that Judge Boldt and Mr. Ferguson are close friends and this explains, in part, Judge Boldt's willingness to meet ex parte with Mr. Ferguson.

10. U-I spent hundreds of thousands of dollars in its defense of the two-year grand jury investigation and was not indicted by the government. Its officers and directors are convinced that U-I has not violated the law and feel that the Company has been vindicated by the government's investigation. Nevertheless, U-I is involved in these actions where it must spend substantial amounts of money in its defense or pay the exorbitant amounts demanded in settlement by plaintiffs' counsel. These cases are extremely important to U-I--in fact, the very existence of a company which has been in business since 1891 may well be at stake.

In a case of this magnitude it is extremely important to U-I that the integrity of the judicial system be above reproach and without the

taint of impropriety. When the assigned Judge holds ex parte conferences with lead counsel for plaintiffs and misstates the record, I believe that it is impossible for U-I to obtain a fair and impartial hearing before the Judge.

11. This Affidavit is submitted in good faith.

John M. Wunderli

SUBSCRIBED AND SWORN to before me this 11th day of October,
1976.

Notary Public, State of Utah

My commission expires:

Jan 1, 1978

Residing in

Intervenor

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION)
)
)

Master File
No. MDL-201

THIS DOCUMENT RELATES TO ALL ACTIONS

AFFIDAVIT OF JOHN R. LEMKE IN SUPPORT
OF MOTION TO DISQUALIFY THE HONORABLE
GEORGE H. BOLDT

STATE OF UTAH)
) ss.
COUNTY OF WEBER)

I, John R. Lemke, being duly sworn, depose and say:

1. I am Legal Counsel of The Amalgamated Sugar Company (hereinafter "Amalgamated"), a defendant in many of the actions coordinated for pretrial proceedings in the Northern District of California before the Honorable George H. Boldt (MDL-201). I am a member of the Bars of the States of Minnesota and California, entitled to practice before the highest courts of those states. Prior to assuming my present position with The Amalgamated Sugar Company in April, 1976, I was employed by another corporation as an attorney and prior to that by the Antitrust Division, Department of Justice.

2. My responsibilities as Legal Counsel for Amalgamated involve all litigation concerning Amalgamated. In connection with those responsibilities, I have become familiar with proceedings in the sugar antitrust actions coordinated before Judge Boldt

- 2 -

insofar as those proceedings pertain to actions in which Amalgamated is a defendant. Such familiarity derives from my review of various orders, pleadings, hearing transcripts, and discovery in the coordinated actions, from attendance at certain hearings, and from consultations with outside counsel conducting Amalgamated's defense in MDL-201.

3. I have carefully studied the Motion to Disqualify the Honorable George H. Boldt and the accompanying Memorandum of Points and Authorities, both filed concurrently herewith. The motion and accompanying memorandum fully set forth the reasons why Amalgamated questions the impartiality of Judge Boldt, why Amalgamated believes Judge Boldt has manifested personal bias and prejudice against Amalgamated, and why Amalgamated believes it cannot obtain a fair and impartial hearing before Judge Boldt.

4. In addition to urging all of the points of fact and law made in the motion and accompanying memorandum, Amalgamated would like to reiterate the three primary reasons why it has concluded that Judge Boldt can no longer properly sit in MDL-201.

5. I am informed and believe Judge Boldt has permitted a series of ex parte communications with plaintiffs which causes Amalgamated to question Judge Boldt's impartiality and freedom from bias and prejudice. These ex parte communications began shortly before Judge Boldt's good friend, Mr. William H. Ferguson, became involved in MDL-201. Over two and one half years before the sugar antitrust actions patterned after five government actions filed in December, 1974 were coordinated

before Judge Boldt, Mr. Ferguson had filed a non-class action (1812 Distributing Corp., et al v. Utah-Idaho Sugar Company, et al (D75-1129)) which had been assigned to Judge Boldt. Prior to coordination of MDL-201 before Judge Boldt, Judge Boldt apparently informed Mr. Ferguson that he, Judge Boldt, wanted the 1812 action coordinated in MDL-201. Shortly after the actions were coordinated, Judge Boldt met with Mr. Ferguson in Mr. Ferguson's hotel room. During this meeting, Judge Boldt signed Pretrial Order No. 1 which appointed Mr. Ferguson Chairman of the Plaintiffs' Steering Committee. These two ex parte communications in and of themselves lead Amalgamated to believe that the primary reason Mr. Ferguson agreed to coordination of the 1812 case and the primary reason Mr. Ferguson was appointed Chairman of the Plaintiffs' Steering Committee, was to gain for plaintiffs in the coordinated proceedings, advantage from his friendship with Judge Boldt. Unfortunately, the ex parte communications between Judge Boldt and Mr. Ferguson have continued. Mr. Ferguson spoke with Judge Boldt on August 18, 1975 regarding the scheduling of pretrial conferences and he later telephoned Judge Boldt to inform him that certain defendants had agreed to settle. This continued dialogue between Judge Boldt and Mr. Ferguson has led Amalgamated to believe that Judge Boldt is biased and prejudiced in favor of the plaintiffs, and that the association of Mr. Ferguson in these cases has unmistakably and improperly produced benefits to the plaintiffs.

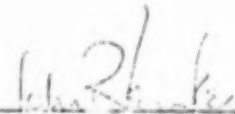
6. I am informed and believe Judge Boldt became aware of the essential terms of the settlements between certain plaintiffs and certain defendants prior to issuance

of its class action order on May 20, 1976. Ordinarily the fact of a settlement or the terms of a settlement would not influence a judge. However, this does not appear to have held true in MDL-201. The settlements, as disclosed to Judge Boldt, were conditioned upon the Court issuing a class action order certifying several extremely broad classes and not certifying consumer classes. The Court's class action order very neatly fits these conditions - - both in certifying broad classes and not certifying consumer classes. The nature of the class action order, particularly with it following disclosure to the Court of the essential terms of the settlements, leads Amalgamated to believe that Judge Boldt was improperly influenced in rendering the order by his knowledge of such settlements.


7. A good indication of bias and prejudice is an inability to acknowledge their presence, and attempts to deny or explain away facts which might support a claim of bias and prejudice. Judge Boldt's recent efforts to restate the record, support Amalgamated's conclusion that Judge Boldt has lost his impartiality and is in fact biased and prejudiced against Amalgamated. The Court in its Minute Order of August 25, 1976 states that "the Court had not learned the contents of the settlements in any manner whatever" prior to issuing its class action order. This statement is not true, and the fact that it relates to the very nature of Judge Boldt's knowledge of the settlements, a subject which defendants have previously questioned, has caused Amalgamated to conclude beyond any doubt that Judge Boldt is no longer impartial. In addition, Judge Boldt during the September 9, 1976 hearing in the Northwest Fertilizer Cases (Master File No. MF-75-1) again denied knowledge of the settlements

and claimed that the settlements had been lodged with the Court under seal. This again is a misstatement of the record directly relating to the claimed bias and prejudice of Judge Boldt. Judge Boldt's apparent lack of candor and his failure to recognize acknowledged facts, confirms Amalgamated's belief that Judge Boldt is biased and prejudiced. Simple neglect or carelessness cannot adequately explain the misstatements of fact by Judge Boldt.

8. In summary, Amalgamated believes that throughout these coordinated proceedings, particularly since the involvement of Mr. Ferguson, Judge Boldt has taken actions which in combination would lead any reasonable person to question his impartiality and which, in fact, now clearly demonstrate a personal bias and prejudice. Amalgamated does not believe it can obtain a fair and impartial hearing before Judge Boldt.


John P. Lemke, Legal Counsel
The Amalgamated Sugar Company

Subscribed and sworn to before me this 14th day of October, 1976.


Notary Public

CERTIFICATE OF COUNSEL

I am informed and believe that the foregoing affidavit of John P. Lemke is made in good faith.

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By 
Robert P. Mallory

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION)

THIS DOCUMENT RELATES TO:)

ALL ACTIONS)

MASTER FILE NO. MDL-201

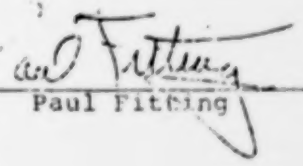
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CITY AND COUNTY OF SAN FRANCISCO)

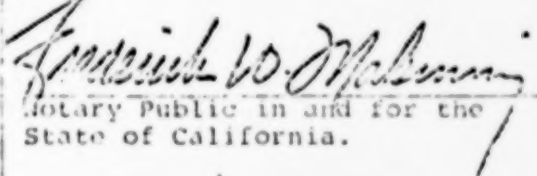
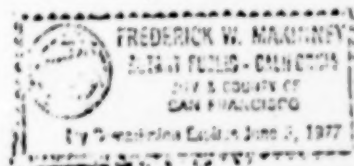
) ss.

My name is Paul Fitting. I am an attorney with the firm of McKenna & Fitting, 220 Bush Street, San Francisco, California 94104. I am a member of the bar of the United States District Court for the Northern District of California and of the State Bar of California.

I hereby certify that the Affidavit of Peter J. Adolph in support of the Motion to Disqualify the Honorable George H. Boldt is filed in good faith, and that this certificate is submitted in good faith by the undersigned.


Paul Fitting

Subscribed and sworn
to before me this
16th day of October, 1976.


Notary Public in and for the
State of California.UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIAIN RE SUGAR ANTITRUST LITIGATION) Master File No. MDL-201
)

THIS DOCUMENT RELATES TO ALL ACTIONS

AFFIDAVIT OF PETER J. ADOLPH IN SUPPORT
OF MOTION TO RECUSE THE HONORABLE
GEORGE H. BOLDT

State of Colorado)

County of Denver)

) ss.

I PETER J. ADOLPH, being first duly sworn, depose
and say:

1. I am Vice President and General Counsel of The Great Western Sugar Company (hereinafter Great Western), a defendant in a number of the actions consolidated for pretrial proceedings in the Northern District of California before the Honorable George H. Boldt. I am a member of the bars of the Commonwealth of Massachusetts, the District of Columbia, the State of Florida and the State of Colorado, and I am entitled to practice before the highest courts of those states and the District of Columbia.

2. I assumed my present position as Vice President and General Counsel of Great Western on May 17, 1976. From June 15, 1975, until May 17, 1976, I was Director of Legal Affairs of Great Western. Since assuming responsibility for the legal affairs of Great

Western, a primary part of my duties has been to remain familiar with and coordinate Great Western's defense in the various sugar antitrust cases consolidated before Judge Boldt, and I have been in constant communication with outside counsel in connection with these responsibilities. Accordingly, I have been kept advised on a continual basis of developments in the sugar antitrust cases, and I am familiar with all of the Court's significant rulings as or shortly after they have been rendered.

3. In addition, I have attended several of the pretrial hearings before Judge Boldt, and have reviewed transcripts of the December 9 and 10, 1976 and August 16 and 17, 1976 hearings before Judge Boldt and the September 9, 1976 transcript of the hearing before Judge Boldt in the Northwest Fertilizer case. The statements and opinions contained herein are based upon my personal knowledge, my review of the documents identified above and many other documents as well as upon information supplied to me by counsel of Great Western and counsel for other defendants.

4. I am, of course, aware of the fact that certain defendants have agreed to settle these case. I was most troubled to learn that the contents of these settlements had apparently been made known to the Court by various means prior to the Court's ruling on the

class action motions in these cases. In my opinion, the nature of these large, conditional settlements should not have been disclosed to the Court, since I believe it made it difficult, if not impossible, for the Court to render a fair, objective decision on those class motions. Significantly, the order the Court entered conforms exactly to the conditions required by the settlement.

5. The Court has now recently stated that at no time did it have knowledge of the content of the settlement agreements. The Court's statement in this regard is not supported by the record as I understand and know it. The Court's denial of any knowledge of the settlements further supports my judgment and belief that the Court is biased against defendants and in favor of the plaintiffs.

6. I have also learned of a number of ex parte conferences which apparently were held between the Court and the Chairman of Plaintiff's Steering Committee, Mr. Ferguson, but I have no way of knowing whether said conferences actually took place or, if they did, what transpired at them. The Court's apparent willingness to meet ex parte with plaintiff's counsel on matters of importance to this litigation, however, is to me extremely suggestive of his bias toward plaintiffs and against the

defendants. Accordingly, I believe that there is a danger that Great Western has not obtained in the past and will not be able to obtain in the future a fair and impartial hearing before Judge Boldt.

7. This affidavit is submitted in good faith.

Peter J. Adolph
Peter J. Adolph

STATE OF COLORADO)
CITY AND COUNTY OF DENVER) ss.

Subscribed and sworn before me this 12th day of
October, 1976.

Joyce Goldman
Joyce Goldman
My Commission Expires July 18, 1979.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION
THIS DOCUMENT RELATES TO ALL ACTIONS

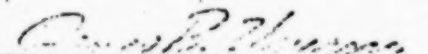
Master File
No. MDL-201

CERTIFICATE OF SERVICE

JAMES B. YOUNG certifies that he is a member of the bar of the United States District Court for the Northern District of California. He is one of the counsel for U and I Incorporated and not a party to these actions. On October 19, 1976, he served the attached Motion to Disqualify The Honorable George H. Boldt and Memorandum of Points and Authorities in Support of Motion to Disqualify The Honorable George H. Boldt upon counsel for all parties, postage prepaid, addressed:

1. To each of the attorneys for plaintiffs listed on plaintiffs' service list a copy of which is attached hereto.
2. To each of the attorneys for defendants listed on defendants' service list a copy of which is attached hereto.

1 3. To the Honorable George H. Boldt, United
2 States District Judge, Post Office Box 1993, Tacoma,
3 Washington 98401 (two copies), and to the attorneys for
4 plaintiffs in additional cases that have come to defendants'
5 attention.

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(Names and Addresses of
Counsel appear below)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

Master File No. MDL 201

THIS DOCUMENT RELATES TO: ALL ACTIONS

NOTICE OF JOINDER
IN MOTION TO DISQUALIFY

PLEASE TAKE NOTICE THAT:

Defendants American Crystal Sugar Company, a
dissolved New Jersey corporation, and American Crystal Sugar
Company, a Minnesota agricultural cooperative, hereby join
in the motion to disqualify the Honorable George H. Boldt
filed by defendants Amalgamated Sugar Company, Amstar
Corporation, Great Western Sugar Company, U and I Incorpo-
rated, and California Beet Growers Association, Ltd., to the
extent said motion is made pursuant to 28 U.S.C. § 455(a) and
adopt the memorandum of points and authorities filed in sup-
port of said motion to the extent it relates to said basis

...

...

...

1 for disqualification.

2 Dated: October 28, 1976.

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19 By _____
20 Lois Omenn Rosenbaum
21 Attorneys for Defendant
22 American Crystal Sugar Company
23 a dissolved New Jersey corporation
24
25
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30

1 CERTIFICATE OF SERVICE

2
3 I, LOIS OMENN ROSENBAUM, being an active member of
4 the State Bar of California, do hereby certify that I am an
5 associate of the firm of Orrick, Herrington, Rowley &
6 Sutcliffe, that my business address is 600 Montgomery Street,
7 San Francisco, California 94111, and that on Thursday,
8 October 28, 1976, I caused a copy of the foregoing NOTICE OF
9 JOINDER IN MOTION TO DISQUALIFY to be served by first class
10 mail on each person appearing on the Eighth Revised Service
11 List for Plaintiff Counsel, dated October 8, 1976, and Defend-
12 ants' Revised Service List, dated May 4, 1976.

13 Dated: October 28, 1976.

14
15 _____
16 Lois Omenn Rosenbaum
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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 IN RE SUGAR ANTITRUST LITIGATION)
8)

9 THIS DOCUMENT RELATES TO:)

10 ALL ACTIONS)
11)
12)

Master File

No. MDL-201

13 PLAINTIFFS' REPLY

14 TO

15 MOTION TO DISQUALIFY

16 THE HONORABLE GEORGE H. BOLDT
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1 (Names and Addresses of Counsel
2 appear on Signature Page)
3
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6 United States District Court for the
7 Northern District of California
8

9 IN RE SUGAR ANTITRUST LITIGATION)
10)

11 THIS DOCUMENT RELATES TO:)

12 ALL ACTIONS)
13)
14)

Master File

No. MDL-201

15 PLAINTIFFS' REPLY TO
16 MOTION TO DISQUALIFY
17 THE HONORABLE GEORGE H. BOLDT

18 In reply to the Motion of certain Defendants to dis-
19 qualify the Honorable George H. Boldt, dated October 18, 1976,
20 Plaintiffs state:

21 1. Defendants' own Affidavits demonstrate that the
22 Motion is patently frivolous and must be dismissed, for the
23 reasons herein set forth: the Honorable George H. Boldt has
24 proceeded throughout this litigation without any actual or
25 apparent prejudice or impropriety whatsoever; there is no basis
26 in the record for any allegation of prejudice, or actual or
27 apparent impropriety of this Court; and there is no basis on
28 which this Court's impartiality may reasonably be questioned.

29 2. It is denied that Defendants do, in fact,
30 question the impartiality of this Court based upon the record in
31 these proceedings. On the contrary, it is averred that their own
32 Affidavits prove that their Motion is not based on any fact in the
record or elsewhere.

1 3. The Court has not manifested personal bias or pre-
2 judice against any party Defendant or in favor of any party
3 Plaintiff, and the Memorandum and Affidavits filed by counsel for
4 certain Defendants in support of their Motion, do not show that
5 this Court has manifested any such bias or prejudice against any
6 Defendant or in favor of any Plaintiff, or that this Court's dis-
7 qualification is required or appropriate under any statute or
8 rule of law.

9 4. It is denied that the purported facts and authorit-
10 ies set forth in the Affidavits or Memorandum of Points and
11 Authorities filed by Defendants in support of their Motion do, in
12 fact or law, support the Motion. On the contrary, it appears
13 therefrom that said Motion is totally without merit for the
14 following reasons, among others:

15 (a) There is no restriction against the appear-
16 ance of counsel in proceedings before a judge who is a friend
17 of counsel.

18 (b) There is no restriction against the communi-
19 cation of settlements to a Court and, on the contrary, federal
20 judges throughout the country regularly participate in settle-
21 ment negotiations in class suits and in other litigation pending
22 before such judges.

23 (c) The record is barren of any evidence whatso-
24 ever and the moving Affidavits do not state that the Honorable
25 George H. Boldt read the settlement agreements to which the
26 moving Defendants object, prior to his decision with respect to
27 the class motions, or that this Court has in any way ever mis-
28 represented that fact or any other fact, with respect to informat-
29 ion received by this Court throughout this litigation. In fact,
30 the record clearly demonstrates that Judge Boldt, out of an
31 abundance of caution, refrained from reading any material relat-
32 ing to proposed settlements until at least after his ruling on

1 In fact, the record clearly demonstrates that Judge Boldt, out
2 of an abundance of caution, refrained from reading any material
3 relating to proposed settlements until at least after his
4 ruling on class motions and reconsideration thereof.

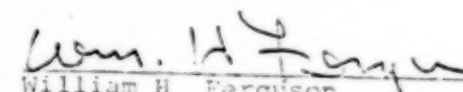
5 (d) The moving Defendants have been informed and
6 know that their Motion is barred by laches and by the provisions
7 of the statute upon which they rely, and have deliberately
8 endeavored to misrepresent the course of these proceedings in
9 an effort to obscure and negate this bar to their Motion.

10 (e) The moving Defendants and their counsel have
11 proceeded from at least December 1975 to date, in a calculated
12 effort to intimidate the Court, Plaintiffs, other Defendants,
13 and counsel for such other parties; in order to delay and prevent
14 (1) the determination of the class motions and (2) the proceed-
15 ings required for approval of the settlements among Plaintiffs
16 and certain other Defendants; and to frustrate the administration
17 of justice and the orderly progress of this litigation.

18 (f) Defendants' Affidavits should be stricken
19 because they are not based on personal knowledge, are hearsay,
20 and are not the Affidavits of the parties.

21 5. In further support of this Reply to the Motion,
22 Affidavits and Memorandum of the moving Defendants, Plaintiffs
23 respectfully submit the attached Memorandum, and Affidavits of
24 William H. Ferguson, (Exhibit A), Joseph D. Cooper (Exhibit B),
25 and Harold E. Kohn (Exhibit C), herewith.

26 Respectfully submitted,

27 
28 William H. Ferguson
Chairman, Plaintiffs' Steering
Committee

Plaintiffs Reply, p. 3

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20 1812 DISTRIBUTING

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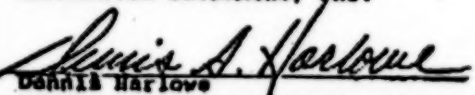
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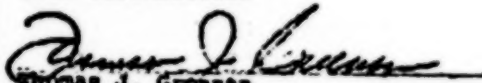
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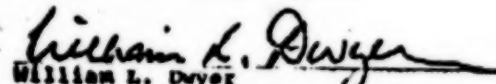
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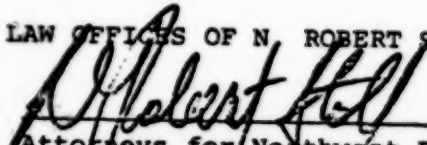
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1012 DISTRIBUTING


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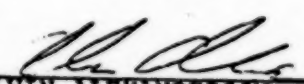
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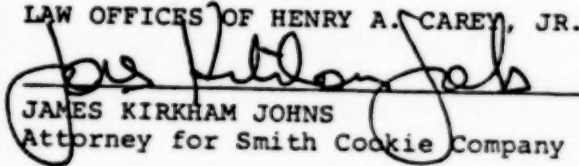
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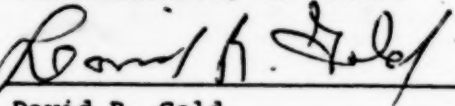

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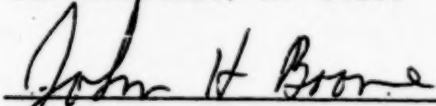

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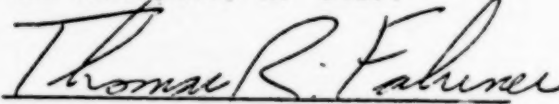
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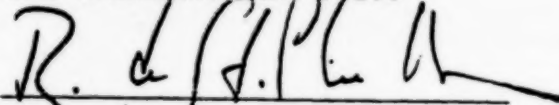
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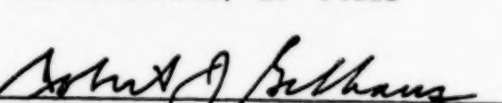
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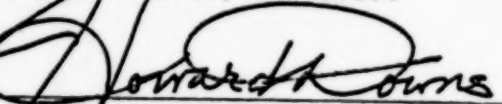
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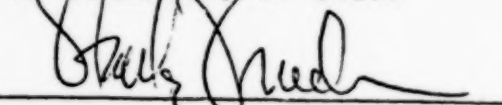
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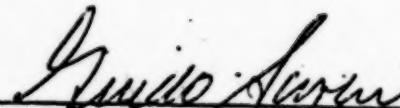
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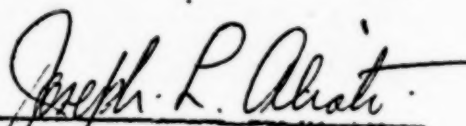
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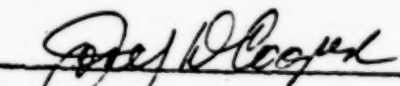
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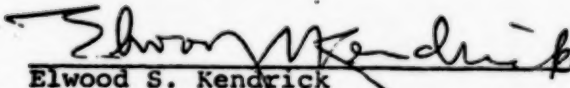


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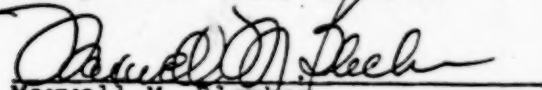


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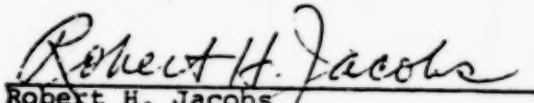
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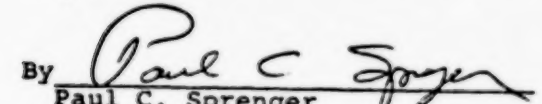
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Mushy, Inc. - R. Vending and
Adams Sales Enterprises Inc.

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COURTESY FOOD MFG.

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Lawrence M. Maher
Genesis Group, Inc.

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Paul S. Gibbins
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Seabright Corporation

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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 IN RE SUGAR ANTITRUST LITIGATION)
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14) THIS DOCUMENT RELATES TO:) NO. MDL-201
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PLAINTIFFS' MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO MOTION TO
DISQUALIFY THE HONORABLE GEORGE H. BOLDT

I.

INTRODUCTION

21 The Motion of certain Defendants to disqualify the
22 Honorable George H. Boldt, and the papers submitted by them in
23 support thereof, are patently frivolous. Plaintiffs are filing
24 Affidavits concurrently herewith, not to contest the truth
25 of the allegations of Defendants, but so that there will be no
26 misunderstanding at any later date that Plaintiffs have agreed
27 to or acquiesce in the many misstatements of fact made by

28
Pltfs.' Memo. of Points & Auth.
In Opp. to Mtn. to Disqualify
Hon. George H. Boldt - p. 1

1 defendants, should those facts later become relevant.

2 Although the defendants have burdened the Court and
3 counsel with more than 175 pages of moving papers, the issues
4 raised and the facts alleged by the defendants, when retrieved
5 from their overlays of repetitious argument and affidavits, are
6 basically these:

7 1. Defendants claim that Mr. Ferguson is a friend of
8 Judge Boldt; that Mr. Ferguson, after first opposing consolida-
9 tion under 28 U.S.C §1407, later agreed to such consolidation;
10 that Mr. Ferguson was appointed by Judge Boldt as Chairman of the
11 Plaintiffs' Committee of Counsel; and, that Mr. Ferguson made
12 certain ex parte communications with respect to scheduling hear-
13 ings and presenting orders as to matters previously ruled upon by
14 the Court.

15 2. Defendants claim that the Court was informed of
16 certain settlements between the plaintiffs and the defendants.
17 Defendants further claim that the Court misstated that it had not
18 read those settlement agreements prior to determining the class
19 motion.

20 Some of these matters, such as the alleged friendship
21 between Mr. Ferguson and the Court, have been known to the
22 defendants since at least the inception of the 1812 litigation in
23 the Western District of Washington more than four years ago. The
24 other claims have been known to the defendants since at least
25 December of 1975, some ten months prior to the filing of the
26 present motion. If there was any merit to any of the contentions -
27 which there is not - the defendants have waived any objection

28
Pltfs.' Memo. of Points & Auth.
In Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 2

1 which they might have had, and are barred by laches and explicit
2 provisions of law and the relevant decisions relating to the
3 statutes upon which they rely, from bringing this motion.

4 Further, the affidavits filed in support of these
5 contentions are fatally defective. The affidavits are those of
6 counsel, based, in large part, upon hearsay and supposition, not
7 affidavits of parties as required by 28 U.S.C. §144.

8 Most significantly, assuming, for the sake of argument,
9 that everything that defendants state in the affidavits filed in
10 support of their contentions, is true, those allegations are
11 grossly insufficient to support a motion to remove a Federal
12 District Judge, and neither require, nor afford a basis for, such
13 disqualification.

14 We respond to the defendants' contentions in the order
15 set forth above:

16 1. The contention that Judge Boldt's alleged friend-
17 ship with William H Ferguson, Chairman of the Plaintiffs' Steering
18 Committee, requires disqualification is totally without merit.
19 There is no allegation whatsoever of any personal relationship of
20 any kind between Mr. Ferguson and Judge Boldt, other than that
21 they practiced as opponents at the same bar prior to Judge Boldt's
22 appointment to the Federal Bench, and are friends. Exhibit "C"
23 to the defendants' memorandum in support of their motion, a
24 transcript of a hearing conducted by Judge Boldt in another
25 litigation, describes a relationship with Mr. Ferguson which is
26 no different than the types of relationships that Judges have
27 with lawyers in every jurisdiction of the country. The pertinent

28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 3

1 portion of Judge Boldt's statement is as follows:

2 ". . . . I have known Bill Ferguson since he
3 came to Seattle from Spokane, wasn't it?

4 MR. FERGUSON: Bellingham.

5 THE COURT: Bellingham. We were about
6 the same age and we had many donnybrooks
7 against each other in litigation. I formed
8 a high opinion of him then, and that still
9 remains. I think he feels the same for me.
10 But as far as having any other relationship,
11 such as financial -- we have a couple of
12 times gone to a football game with our
13 wives, usually we have along someone else
14 on the other side, if there is any litigation
15 pending, so that no one will take any false
16 impression from it. That is the extent of
17 our relationship. If there is anything
18 improper in that, make the best of it, because
19 it is no closer a relationship than I have
20 with a great many other lawyers all over the
21 country. Most of my friends are lawyers and
22 I have never before had one of them seek to
23 have me recuse myself in their litigation.
24" (Ex. C, p. 47, l. 19 to p. 48,
25 l. 12)

26 As described in the affidavit of William H Ferguson,
27 filed concurrently herewith, the track record of the law firm of
28 Ferguson & Burdell before Judge Boldt clearly demonstrates a lack
of bias, prejudice, or partiality on the part of Judge Boldt,
either in favor of the clients of that law firm, or against those
with whom they have litigated. In the "Forks Fire" litigation, a
major federal tort claims matter, Ferguson & Burdell appealed to
the Ninth Circuit Court of Appeals on two separate occasions and
to the United States Supreme Court, from adverse rulings of Judge
Boldt. Arnhold v. United States (9th Cir. 1955) 225 F.2d 649;
Rayonier, Inc. v. United States (1956), 352 U.S. 315, 1 L.Ed.2d
354, 77 S.Ct. 374; Arnhold v. United States (9th Cir. 1960) 284
F.2d 326.

Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 4

1 Similarly, in a widely publicized criminal tax evasion
2 action wherein Ferguson & Burdell represented the former general
3 president of the Teamsters Union, Judge Boldt made certain
4 critical rulings adverse to the defendant, which were reversed
5 on an appeal from his conviction. Beck v. United States (9th
6 Cir. 1962) 298 F.2d 622, cert. den. 83 S.Ct. 186, 371 U.S. 890, 9
7 L.Ed.2d 123.

8 In the Western Liquid Asphalt litigation, wherein
9 Ferguson & Burdell appeared on behalf of the State of Washington,
10 Judge Boldt, under the peculiar facts of that litigation, refused
11 to establish a governmental entity class, but required the parties
12 to proceed by way of intervention and joinder.

13 The extended effort on the part of defendants to make
14 some point by alleging that Mr. Ferguson had originally opposed
15 consolidation pursuant to 28 U.S.C. §1407, and later consented to
16 it, to the extent that it was comprehensible, is inconsequential.
17 As the affidavit of Mr. Ferguson clearly demonstrates, the
18 decision with regard to consolidation, insofar as it was in Mr.
19 Ferguson's hands, was reached after weighing all of the relevant
20 considerations. On the one hand, the 1812 case had been pending
21 approximately two years prior to consolidation, whereas, on the
22 other hand, consolidation provided the opportunity for a joint
23 effort with a large number of experienced antitrust counsel. Mr.
24 Ferguson's ultimate decision was based upon those considerations.

25 The defendants' contention that Judge Boldt appointed
26 Mr. Ferguson the Chairman of the Plaintiffs' Steering Committee
27 is without merit. Mr. Ferguson stated on the record at the out-

28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 5

1 set of the first pretrial hearing conducted by the Court that he
2 was acting as Chairman of the plaintiffs' group. (TR. 7/8/75, p.
3 4, l. 9). Judge Boldt acknowledged on the record, that day, that
4 Mr. Ferguson was acting as Chairman. (TR. 7/8/75, p. 100) He
5 made it clear on the record that he had not appointed any execu-
6 tive committees, steering committtes or leaders, acknowledging
7 that, while he had the authority to do it, it had always been his
8 practice to allow counsel involved to select their own leaders if
9 they felt the necessity for so doing. The Court only approved
10 what counsel had agreed upon. (TR. 12/10/75, p. 190, l. 3-10)
11 Of course, even if the Court had appointed a Chairman of the
12 Plaintiffs' Steering Committee, such appointment would not serve
13 as any grounds for disqualification because the manual permits
14 the Court to make such appointments and many Judges do so.

15 2. The assertion that the Court was informed of
16 certain settlements between the plaintiffs and some defendants,
17 and that such information constitutes the grounds for disquali-
18 fication, is similarly without merit.

19 First of all, the defendants have not indicated any
20 authority which would support a restriction on communications
21 with respect to settlement to a Judge before whom litigation is
22 pending. This is regularly done; many Judges insist upon par-
23 ticipating in settlement negotiations while continuing to super-
24 vise the litigation against the same or other parties. Judges
25 handle nolo contendere pleas in criminal actions and continue to
26 supervise related criminal and civil litigation. e.g., U.S. v.
27 H.S. Crocker Co., Inc., et al., (N.D. Cal. 1974) CR-74-182, 5 CCH
28 Trade Cases ¶45,074.

Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 6

1 Despite the hundreds of pages and thousands of
2 words in the defendants' moving papers, there is not one
3 statement or assertion to the effect that Judge Boldt ever
4 read the settlement agreements prior to the determination of
5 the class motions. To the contrary, the record is replete
6 with statements indicating that the Court meticulously
7 avoided reading the proposed settlements with certain
8 defendants until after his order on class motions had been
9 entered, reconsidered and affirmed.

10 At the close of the hearing on December 9, 1975,
11 the Court stated that he wanted to get the views of the
12 parties concerning what, if anything, the Court should do
13 with respect to the proposed settlements that had been
14 mentioned to him. (TR. 12/9/75, p. 162, l. 1) The following
15 day, in open Court, the Judge sought to relieve the minds of
16 all the parties concerning any possible impropriety that
17 might exist because of the delivery to him of a document
18 which contained a copy of the proposed settlement. Judge Boldt
19 stated, on the record, that the chief counsel for Amstar
20 knew firsthand that he had only received such document
21 the prior morning, and had had no time to read it except
22 to scan the title prior to being asked by defendants' not
23 to consider the proposed settlement before ruling on the class.
24 The Court then stated that the documents remained the way
25 that he had received them, and that he was not going to look
26 at them again until an appropriate time came when all agree
27 that it would be proper. Defendants did not contest these
28 facts at the December 9-10, 1975 pretrial hearing, and have not
29 contested them to this date. He further assured the parties
30 that no settlement would be considered until after the

31 Pltfs.' Memo. of Points & Auth.
32 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 7

1 ruling of the Court on class motions. (TR. 12/10/75, p.
2 171, l. 14 - p. 172, l. 6) In fact, the Court was unaware
3 of any of the specific provisions of the settlement until
4 counsel for the defendants chose to inform him of certain
5 provisions during argument. (TR. 12/10/75, p. 182, l. 15-
6 19; p. 185, l. 6-9). As a final assurance to the parties
7 concerning possible prejudice from the consideration of any
8 proposed settlement, the Court stated:

9 "Now, let me say two or three things, and
10 then we will be finished with this subject.
11 I repeat now, again, what I have said two
12 or three times previously, that as far as
13 I am concerned I shall not inquire into,
14 receive, or accept any information on the
15 subject of these proposed settlements. I
16 will make no ruling concerning the matter
17 in any way whatever at least until such
18 time as all counsel seek one or at least
19 are available to participate in the matter
20 before the ruling is made. This is just
21 hornbook every day procedure, especially
22 for one who has been a Trial Judge for many
23 years and whose conduct, so far as I know,
24 has never been questioned excepting in one
25 instance here in San Francisco when I
26 received criticism for moving too rapidly.
27 And that may have been well taken, for all
28 I know." (TR. 12/10/75, p. 198, l. 11-25)

20 All the facts in the record consistently support the repeated
21 announcements by the Court that it would follow this procedure.
22 There is nothing in the record to in any way suggest that the
23 Court read the settlement agreement prior to its May 20, 1976
24 ruling. In fact, on August 16, 1976, months after the
25 Court's initial decision on class actions, the Court again stated
26 that he had not yet read any version of the proposed settlement.
27 (TR. 8/16/76, p. 108, l. 5-18)

28 Defendants allegations of prejudice are based on
29 a series of alleged ex parte communications, all of which
30 alleged incidents were known and acknowledged by defendants

31 Pltfs.' Memo. of Points & Auth.
32 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 8

1 before making their two informal requests that Judge Boldt
2 recuse himself. Defendants specifically state that they
3 intended to and, in fact, did request the Court to withdraw
4 from presiding over litigation matters in these proceedings
5 at the December 22, 1975 meeting. (See Affidavit of John M.
6 Wunderli, page 2, paragraph 5.) Yet, at that meeting,
7 defendants did not indicate that they believed any of the
8 contacts Mr. Ferguson had with the Court were either improper
9 or a basis for disqualification. At that meeting, and again
10 at the September 23, 1976 conference in Boston, defendants
11 limited their complaints to the Court's receipt of the
12 unread Holly Agreement and the "skimmed" Freeman letter.*

13 In order to overcome the untimeliness of defendants'
14 motion, they point to two further incidents which allegedly
15 demonstrate this Court's impartiality, i.e., (A) the Holly
16 Agreement was filed under "seal", and, (B) the language
17 inserted by the Court into Pretrial Order No. 12.

18 It was plaintiffs' Coordinating Counsel who was
19 responsible for filing on December 5, 1975 the original
20 Holly Settlement Agreement, which was attached to the Request
21 for Establishment of a Schedule for Consideration of the
22 Proposed Settlement. That document was filed prior to the
23 Pretrial Conference on December 9-10, 1975, before the non-
24 settling defendants had voiced any objection to the Court
25 receiving a copy of the proposed settlement agreement, and
26 prior to transmittal to the Court. Accordingly, it was not
27 actually filed under "seal" with the Clerk. However, Judge
28

29 * Defendants seem to forget that it was Mr. Kirkham,
30 defendants' Coordinating Counsel, who made the Freeman letter
31 part of the record.

32 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 9

1 Boldt stated informally in chambers on December 9, and on the
2 record on December 10, that he had not read the contents of
3 the Settlement Agreement, and that he had kept his copy of
4 the document "sealed" since its receipt. Nowhere is it
5 suggested that the Court ever did otherwise but abide by his
6 statement. The fact that actual filing of the settlement
7 with the Clerk was not under seal is immaterial. The
8 Court's use of the word "seal" in a technical sense at the
9 Fertilizer hearing is insignificant and irrelevant since
10 whether the Agreement was under seal at the Clerk's office is
11 immaterial, even by defendants' reckoning, as long as it was
12 not read by the Court.

13 The second alleged recent circumstance prompting
14 defendants' Motion is the language inserted by the Court in
15 Pretrial Order No. 12. Nothing contained therein contradicts
16 the state of the record. As explained in the Affidavit of
17 Josef D. Cooper, attached hereto, there were extensive
18 negotiations between counsel during the drafting of Pretrial
19 Order No. 12 which memorialized the Court's rulings at the
20 August 16-17, 1976 pretrial conference. The Court had
21 directed counsel to prepare and submit Pretrial Order No. 12
22 to him at the then scheduled conference in Tacoma on Monday,
23 August 23, 1976. After the conference was cancelled at
24 defendants' request, counsel continued to attempt to reconcile
25 their differences in order to jointly submit the Order for
26 the Court's approval.

27 Late Friday afternoon, on August 20, Mr. Cooper
28 and Mr. Mallory agreed to a proposed form of order containing
29 the sentence: "The Court had not previously had an opportunity

30 Pltfs.' Memo. of Points & Auth.
31 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 10
32

1 to review such Agreement", referring to the final version of
2 the settlement agreement with Holly, Union and C and H.
3 After several clerical corrections to the proposed Order, it
4 was finalized and transmitted for delivery to Judge Boldt on
5 Monday.

6 At the commencement of the work day on Monday,
7 August 23, 1976, defendants notified plaintiffs' Coordinating
8 Counsel that they wanted a further modification in the
9 relevant portion of proposed Pretrial Order No. 12. Mr.
10 Mallory asked that the sentence "The Court had not previously
11 had an opportunity to review this particular form of Agreement"
12 be substituted for the previously agreed-upon language.

13 On behalf of plaintiffs, Mr. Cooper refused to
14 approve this change since it misstated the record of these
15 proceedings. After receiving a telecopy of Mr. Mallory's
16 letter to the Court, Mr. Cooper also wrote Judge Boldt and
17 expressed plaintiffs' view that the proposed change to the
18 Order submitted by defendants implied that the Court had
19 reviewed the contents of the Holly Settlement, when in fact
20 Judge Boldt had repeatedly stated that he had not read that
21 document.* Plaintiffs suggested that the Court either leave
22 the Pretrial Order as submitted, or exclude defendants'
23 insertion entirely. The Court instead modified the language
24 to comply with the record, stating that it had "not learned
25 the contents of the settlement agreements" (emphasis added)
26 prior to consideration of the form of class notice. Contrary
27

28 * Again defendants attempt to impute knowledge of the
29 terms of the Holly Agreement from the November 26, 1975
30 letter from Mr. Freeman. Yet the Court openly acknowledged
31 merely skimming the letter and the obvious advocacy of
32 Mr. Freeman's style.

Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 11

1 to defendants' assertion, this statement is consistent
2 with the record, and is not the euphemistic "untrue statement"
3 alleged by defendants.

4 Chief counsel for Amstar acknowledged at the
5 hearing on December 10, 1975, that the non-settling defendants
6 had been informed that the plaintiffs, or perhaps a settling
7 defendant, had advised the Court of the amount of one of the
8 proposed settlements prior to that settling defendant giving
9 a press release to the Wall Street Journal. Counsel for
10 defendants clearly stated that they were aware of that
11 background at the time. (TR. 12/10/75, p. 198, l. 16-25)

12 What is plain from the moving papers is that the
13 moving defendants have deliberately embarked upon a scheme
14 to intimidate this Court and counsel, in order to prevent
15 the expeditious conduct of this litigation. The pending
16 motion is simply the most recent attempt at delay and seems
17 to be borne out of a realization that they have not succeeded
18 in their basic effort to intimidate the Court on the issues
19 of substance.

20 The allegedly "recent" events cited by defendants are
21 simply an attempt to avoid their waiver of any right to
22 complain about the asserted improprieties, and, as such, are
23 based on a constrained and twisted version of the facts.
24 The fact that the defendants have not been prejudiced by
25 anything Judge Boldt has done in connection with his considera-
26 tion of the class action motions is demonstrated by the fact
27 that Judge Edwin N. Cahn, who is supervising the consolidated
28 Eastern Sugar cases in the Eastern District of Pennsylvania,
29 on October 21, 1976, entered his opinion and order establishing
30 classes in that litigation, which classes are almost identical

31 Pltfs.' Memo. of Points & Auth.
32 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 12

1 to those established by Judge Boldt. Judge Cahn's decision
2 was reached without consideration of any proposed settlements,
3 since none have been reached in the Eastern cases.

4 The defendants argue that Judge Boldt must have
5 read the Holly settlement papers for, they state, he has
6 fashioned classes along the lines of those contemplated in
7 the settlement papers. This reasoning falters, however,
8 since the classes tentatively established vary from those
9 contemplated in the Holly agreement in very material respects,
10 i.e., the Court granted state governmental entity classes
11 only in those instances where the state had brought an
12 action in its own name, whereas the settlement contemplated
13 that the named state plaintiffs would act as representative
14 parties for the public entities in other states which had
15 not brought actions. Further, the Court broadened the class
16 of retail grocery stores contemplated by not establishing a
17 level of minimum purchases such as was anticipated in the
18 Holly papers.

19 Were it not so cruel, this unfounded attack upon
20 the Court would be ridiculous. Judge Boldt has been an
21 esteemed United States District Judge for more than twenty-
22 two years. During that period of time he has handled major
23 litigation in judicial districts throughout the country. He
24 was a member of the Coordinating Committee of Judges in the
25 Electrical litigation which developed many of the procedures
26 now common in Multi-District litigation. He was among the
27 writers of the Handbook of Recommended Procedures for the Trial
28 of Protracted Cases, 25 F.R.D. 351 (1960), and continues to
29 act as a member of the Board of Editors of the Manual for Complex
30 and Multi-District Litigation, attending to the continued

31 Pltfs.' Memo. of Points & Auth.
32 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 13

1 process of revision and updating required in connection
2 therewith. The procedures articulated by Judge Boldt at the
3 December 9 conference, and followed in these actions, are
4 totally consistent with the recommendations of the Manual.
5 His reputation as a trial judge in protracted litigation,
6 particularly antitrust cases, is equivalent to that of any
7 federal jurist, and his impartiality in these matters has
8 not been challenged except by some of the same law firms who
9 have filed the instant motion, in recent proceedings before
10 the Judicial Panel and in the Northwest Fertilizer litigation.

11 Each of the Court's rulings in this litigation has
12 been founded on sound legal principles and precedent, and
13 not maneuvered by plaintiffs or prompted by some inherent
14 prejudice against defendants. At the onset of the class
15 action briefing schedule, defendants were granted an initial
16 four-week extension of time in which to conduct class action
17 discovery by interrogatories and depositions as a necessary
18 prerequisite to their first memoranda in opposition to
19 plaintiffs' class action motions (see Order Re Defendants'
20 Motion for Extension of Time and Additional Discovery, dated
21 October 7, 1975), and an additional two-week extension
22 thereafter. Later they requested and received a 30-day
23 extension for an economic report.

24 Furthermore, six defendants alleged a myriad of
25 counterclaims against both plaintiffs and unidentified class
26 members. After extensive briefing, which included the
27 submission of supplemental memoranda after oral argument at
28 the December 9-10, 1975 pretrial conference, the Court
29 refused "to strike any of defendants' counterclaims on the
30 basis of the argument of counsel rather than upon facts

31 Pltfs.' Memo. of Points & Auth.
32 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 14

1 developed in discovery." (See Order Re Plaintiffs' Motion
2 to Dismiss Defendants' Counterclaims, dated March 4, 1976).
3 Plaintiffs were obliged to answer all counterclaims and to
4 include a sentence in the proposed Notices to class members
5 informing members of the industrial user, retail grocer,
6 wholesaler and agricultural molasses user classes that
7 defendants have filed various counterclaims against certain
8 plaintiffs and class members. (See Pretrial Order No. 12,
9 dated August 25, 1976).

10 In tentatively certifying the various classes, the
11 Court rejected certain plaintiff states' contentions that
12 they were proper representatives for either consumer house-
13 hold units residing in their respective states or that they
14 could properly represent all states and governmental entities
15 in their market areas which had not filed individual actions.
16 (See Opinion and Order Re Class Actions, dated May 20,
17 1976).

18 In addition, the Court ruled in favor of defendant
19 National Sugarbeet Growers Federation's motion to dismiss
20 for lack of jurisdiction and proper venue (see Order Re
21 Dismiss for Lack of Jurisdiction and Proper Venue, dated
22 March 4, 1976), and imposed sanctions against certain plaintiffs
23 who did not comply with defendants' discovery requests (see
24 Order Re Defendants' Motion to Dismiss for Failure to Answer
25 or Timely Answer Defendants' Class Action Interrogatories,
26 dated March 4, 1976).

27 . . .

28 . . .

29 . . .

30 Pltfs.' Memo. of Points & Auth.
31 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 15

1 II.

2 THE ALLEGATIONS DO NOT SHOW BIAS, 3 PREJUDICE, PARTIALITY OR IMPROPRIETY

4 Section 455 was not intended to and does not "grant an
5 automatic veto power in order that counsel might choose a judge
6 who meets with their approval." Samuel v. University of
7 Pittsburgh, 395 F.Supp. 1275, 1277 (W.D. Pa. 1975), reversed on
8 other grounds, 538 F.2d 991 (3d Cir. 1976).

9 Defendants contend that allegations in their affidavits
10 presented to this Court require disqualification of this Court,
11 pursuant to 28 U.S.C. §455(a), which provides:

12 "Any justice, judge, magistrate, or
13 referee in bankruptcy of the United States
14 shall disqualify himself in any proceeding
15 in which his impartiality might reasonably
16 be questioned."

17 Defendants cite cases, treatises, and legislative
18 history which do not support Defendants' contentions. On the
19 contrary, it is respectfully submitted that Defendants' cited
20 authorities provide substantial support for and require this
21 Court's denial of Defendants' motion.

22 Defendants quote from the legislative history of 28
23 U.S.C. §455(a), but have chosen to ignore a very pertinent piece
24 of legislative history in their Memorandum. In the report from
25 the Senate Judiciary Committee, recommending adoption of the 1974
26 amendments, it was stated:

27 "At the same time, in assessing the reason-
28 ableness of a challenge to his impartiality,
29 each judge must be alert to avoid the possi-
30 bility that those who would question his
31 impartiality are in fact seeking to avoid the

32 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 16

1 consequences of his expected adverse decision.
2 Disqualification for lack of impartiality
3 must have a reasonable basis. (Emphasis in
4 the original.) Nothing in this proposed
5 legislation should be read to warrant the
6 transformation of a litigant's fear that a
7 judge may decide a question against him into
8 a 'reasonable fear' that the judge will not
9 be impartial. Litigants ought not to have
10 to face a judge where there is a reasonable
11 question of impartiality, but they are not
12 entitled to judges of their own choice.
13 S. Rep. No. 93-419, 93rd Cong., 1st Sess.,
14 1973, p. 5, quoted in 13 Wright, Miller &
15 Cooper, supra, at 371-372.

16 28 U.S.C. §455 was amended in 1974 to provide for
17 disqualification of a Judge when "his partiality might reasonably
18 be questioned." Prior to that amendment, the section provided
19 for such disqualification if "in the opinion of the Judge" he
20 could not be impartial. The question that arises is whether the
21 test for removal of a Judge pursuant to §455 is different, in any
22 respect, from the test required under 28 U.S.C. §144 providing
23 for the removal of a Judge because of bias and prejudice. It
24 would appear that the test, under either statute, is that dis-
25 qualification can come only from extra-judicial conduct which
26 runs against a party, and not the lawyer. For example, in
27 Davis v. Board of School Commissioners of Mobile County (5th
28 Cir., 1975) 517 F.2d 1044, 1052, the Court stated:

1 "The quoted language, supra, in §455 is new
2 to the federal law of disqualification and
3 we must determine whether Congress intended
4 to overrule the gloss placed on §144, and
5 impliedly on §455, by court decisions that
6 it applies only to conduct which runs against
7 a party and not the lawyer, cf. United States
8 ex rel Wilson v. Coughlin, supra, at 104;
9 Giebe v. Pence, supra, at 943; see also,
10 Annot., 23 A.L.R.3d 1416; and that disquali-
11 fication results from extra-judicial conduct

12 Pltfs.' Memo. of Points & Auth.
13 in Opp. to Mtn. to Disqualify
14 Hon. George H. Boldt - P. 17

1 rather than from matters arising in a judi-
2 cial context. See United States v. Grinnell
3 Corp., supra, 384 U.S. at 583, 86 S.Ct. 1698,
4 16 L.Ed.2d at 793; United States v. Board of
5 School Commissioners, supra, at 81; Hanger v.
6 United States, supra, at 101; Mirra v. United
7 States, supra, at 787-88; Tynan v. United
8 States, supra, at 764-65; In re Union Leader
9 Corp., supra, at 388-89. See generally,
10 Annot. 2 A.L.R. Fed. 917.

11 We find no suggestion in the legislative
12 history that these decisions were being
13 overruled or in anywise eroded. The new
14 language was designed to substitute the
15 reasonable factual basis - reasonable man
16 test in determining disqualification for the
17 subjective 'in the opinion of the judge'
18 test in use prior to the amendment. Cf.
19 Kinnear-Weed Corp. v. Humble Oil & Refining
20 Corp., 5 Cir., 1971, 441 F.2d 631, 635. It
21 was also intended to overrule the so-called
22 duty to sit decisions. See Edwards v. United
23 States, 5 Cir., 1964, 334 F.2d 360. The
24 abuse of sound judicial discretion test con-
25 tinues to obtain on appellate review. H. Rep.
26 No. 93-1453, 1974 U.S. Code Cong. & Admin.
27 News pp. 6351, 6355.

28 Construing §§144 and 455 in pari materia we
believe that the test is the same under both.
We thus hold that an appellate court, in
passing on questions of disqualification of
the type here presented, should determine the
disqualification on the basis of conduct which
shows bias or prejudice or lack of impar-
tiality by focusing on a party rather than
counsel. The determination should also be
made on the basis of conduct extra-judicial
in nature as distinguished from conduct within
a judicial context. This means that we give
§§144 and 455 the same meaning legally for
these purposes, whether for purposes of bias
and prejudice or when the impartiality of
the judge might reasonably be questioned."

1 A fortiori Congress did not intend the amended statute
2 to be used as a vehicle for disgruntled litigants to judge-shop
3 after their effort to intimidate the Court has not succeeded.

4 Defendants quote at length from United States v.
5 Pltfs.' Memo. of Points & Auth.
6 in Opp. to Mtn. to Disqualify
7 Hon. George H. Boldt - P. 18

1 Zarowitz, 326 F.Supp. 90 (C.D. Cal. 1971), a case in which the
2 trial judge, although finding himself free of bias and prejudice
3 under the predecessor statute to 28 U.S.C. §455, recused himself
4 on the grounds that the facts alleged in the affidavits created
5 the appearance of impropriety. (Defendants' Brief at p. 38-39.)
6 However, the facts of the Zarowitz case are not analogous to the
7 questions before this Court. In Zarowitz, the trial judge had
8 entered five orders authorizing wiretaps. The Court was required,
9 pursuant to federal wiretapping statutes, to receive reports
10 every five days, and to file secret, ex parte evidence reports.
11 The Zarowitz court noted that those reports would be relevant and
12 would, in all probability, be introduced in evidence. Consider-
13 ing the judge's knowledge and involvement in the pre-indictment
14 investigations, as well as what the Court termed "pre-knowledge
15 or pre-viewing by this Judge of evidence helpful to the prosecu-
16 tion but prejudicial to the defense," 326 F. Supp. at 92, the
17 Court concluded that an appearance of possible bias or prejudice
18 might result. The Zarowitz case is not relevant to the case
19 before this Court. There is no statement in any affidavit
20 alleging that this Court has been required, nor indeed received,
21 any such evidentiary information concerning innocence or guilt
22 such as that received by Judge Hauk in the Zarowitz case.

23 Judges regularly rule upon and exclude evidence; they
24 rule upon motions to suppress; they participate in settlement
25 negotiations, and they proceed with litigation which has been
26 partially settled; all without disqualification.

27 Defendants cite United States v. Ritter, 45 L.W. 2065

28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 19

1 (10th Cir. Jul. 15, 1976). In that case the Appellate Court
2 ordered that District Judge Ritter should be disqualified
3 "based upon his alleged personal relationship with a defense
4 attorney." (Defendants' Brief p. 39-40). In the Ritter
5 case, the government moved to disqualify the judge because
6 the attorney for the defendants, who was the President of
7 the Utah Bar Association, presided over a commission which
8 considered some resolutions pertaining to impeachment
9 proceedings affecting Judge Ritter. The resolutions were
10 rejected by the commission.

11 The Ritter case was a criminal prosecution. The
12 Tenth Circuit Court of Appeals, noting that the government
13 had failed to show any impropriety on the part of the defense
14 counsel or on the part of the judge, voiced concern, however,
15 because a criminal prosecution was pending. The Court also
16 described the judge as "indeed caustic and overbearing
17 toward counsel for the government, and part of this no doubt
18 resulted from the filing of motions demanding that he disqualify
19 himself." 45 L.W. at 2065.

20 It is of comparative interest that the United States
21 Court of Appeals for the Tenth Circuit, and the Supreme Court

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30 Pltfs.' Memo. of Points & Auth.
31 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 20

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1 of the United States, in two separate proceedings, deemed
2 it necessary to remove the same trial judge, and to appoint
3 other judges to act in his stead. United States v. Hatahley,
4 257 F.2d 920 (10th Cir., 1958); Cascade Natural Gas Corp. v.
5 El Paso Natural Gas Co., 386 U.S. 129 (1967). In a prior
6 decision in the Hatahley litigation, the Tenth Circuit
7 observed "that the case was tried in an atmosphere of maximum
8 emotion and a minimum of judicial impartiality." 220 F.2d 666,
9 670. In contrast, nothing in this record supports a contention
10 that the Court has ever acted in a caustic or overbearing
11 manner toward parties or counsel, and, indeed, the defendants
12 do not so contend.

13 Judge Sirica, denying a recusal motion by several
14 Watergate Defendants based on the Judge's intensive personal
15 involvement in the Watergate prosecutions, said: "[T]he
16 impartiality of the judge is presumed." United States v.
17 Mitchell, 377 F. Supp. 1312, 1316 (D.D.C., 1974), petition
18 for mandamus denied, 502 F. 2 375, cert. denied, 418 U.S.
19 955, 94 S. Ct. 3232, 41 L. Ed. 2d 1117 (1974).

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30 Pltfs.' Memo. of Points & Auth.
31 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 21

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1 The presumption of impartiality cannot be lightly dis-
2 carded. The amended statute cannot and should not be used as a
3 means to intimidate the judiciary. The Honorable A. Andrew Hauk,
4 in refusing to disqualify himself in Mavis v. Commercial Carriers,
5 Inc., 408 F. Supp. 55 (C.D. Cal. 1975), described the scope of
6 inquiry under amended Section 455 as follows:

7 "Thus it is incumbent upon us first to
8 determine whether this is a proceeding
9 in which the Judge's impartiality might
10 reasonably be questioned. Disqualifica-
11 tion or recusal certainly is not auto-
12 matically required merely upon the filing
13 of the letter request, declarations or
14 affidavits. If there were support for
15 this line of reasoning, the floodgates
16 would be opened to 'judge shopping' and
17 the impressive body of precedents which we
18 have heretofore cited in Berger and its
19 progeny would be wiped out. In any event,
20 while the new and revised statute on
21 judicial disqualification, 28 U.S.C. §455,
22 broadens the grounds for recusal or dis-
23 qualification, and is intended to eliminate
24 the 'duty to sit' concept of the old statute,
25 it has not changed the law to the extent
26 Plaintiff's counsel attempts to suggest. The
27 standard of the general disqualification pro-
28 vision, Section 455(a) of 28 U.S.C., is still
one of reasonableness and should not be
interpreted to include a spurious or loosely
based charge of partiality." 408 F. Supp.
at 61.

21 As further discussed herein, not one of the Defendants'
22 allegations substantiates charges that this Court's impartiality
23 can be questioned. Defendants have constructed an argument based
24 on their own attacks on this Court.

25 Confronted with a similar situation in In Re: Union
26 Leader Corporation, 292 F. 2d, 381 (1st Cir. 1961), the First
27 Circuit denied a Petition For Mandamus to review the trial court's
28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 22

1 refusal to recuse itself. The Appellate Court quoted the trial
2 judge as follows:

3 "It is true that your client has been
4 in the business of attacking me, but I
5 haven't attacked your client. And I
6 regard his misconduct as giving no basis
7 for alleging misconduct on my part." 292
8 F.2d at 388.

9 That is this case, on all fours.

10 In denying the Petition for Mandamus the First Circuit
11 stated:

12 "A judge lives in an atmosphere of strife,
13 in which, by nature and experience, he is
14 expected to be a man of 'fortitude.'
15 (citations omitted) He must continually
16 rule against one party or another. No
17 judge can be so sanguine as to believe
18 that he is never the object of disapproval
19 and criticism directed to something more
20 personal than his abstract judicial actions.
21 If such disapproval is brought openly to
22 his attention he does not automatically
23 change from benign to biased. It is neither
24 practical nor reasonable to liken a judge
25 to an ostrich; unconcerned so long as his
26 head is in the sand." 292 F. 2d at 389.

27 Defendants also contend that the Affidavits which they
28 have submitted to this Court allege personal bias or prejudice in
favor of Plaintiffs and against Defendants, so as to require
disqualification pursuant to 28 U.S.C. §§144 and 455(b)(1).

For the reasons set forth herein, Plaintiffs respectfully submit that, even accepting the misleading allegations of Defendants as verity, the allegations do not support charges of bias or prejudice on the part of this Court.

Defendants' Memorandum appears to rewrite the body of law which has developed under 28 U.S.C. §§144 and 455. Defendants
Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 23

1 categorize the conclusions in their Affidavits as facts. Con-
2 clusions have never been deemed sufficient ground for disquali-
3 fication of the trial judge. See, e.g., Willenbring v. United
4 States, 306 F.2d 944 (9th Cir. 1962). Defendants also overlook
5 the fact that if an affidavit is based on hearsay, that fact may
6 be taken into account in judging the sufficiency of an affidavit.
7 See, e.g., Hodgson v. Liquor Salesmen's Union Local No. 2 of
8 State of N. Y., Distillery, Rectifying, Wine and Allied Workers'
9 Intern. Union of America, AFL-CIO, 444 F.2d 1344 (5th Cir. 1971).

10 Defendants cite United States v. Sciuto, 531 F.2d 842,
11 845-46 (7th Cir. 1976), for the proposition that the Seventh
12 Circuit Court of Appeals "held disqualification under Section 144
13 was appropriate on the basis of the presiding judge's ex parte
14 conversations with the probation officer concerning the revoca-
15 tion of the Defendants' probation." (Defendants' Brief, p. 48-
16 49). However, a careful reading of that case shows that it was
17 not the ex parte communications, but rather that the Affidavit
18 stated that the District Judge was "convinced that the Defendant
19 had been dishonest and deceitful with the probation officer and
20 in all probability with affiant. . .[and] that his [the Court's]
21 mind had been made up that the Defendant had violated the terms
22 of his probation," 531 F.2d 844-845. The Sciuto Court further
23 indicated that it was prejudgement resulting from the ex parte
24 communication which required disqualification, not the communica-
25 tion itself. The Court recognized that the judge would receive
26 reports from the probation officer, and that only if the infor-
27 mation in the report "unavoidably causes him [the judge] to pre-

28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 24

1 judge an issue of fact bearing on revocation, he must disqualify
2 himself. 531 F.2d at 846.

3 In Schmidt v. United States, 115 F.2d 394 (6th Cir.
4 1940), cited by Defendants in their Memorandum at page 49, the
5 Sixth Circuit Appellate Court disqualified the District Judge,
6 pursuant to Section 144. In Schmidt, the Affidavits averred that
7 the District Judge had a conference with the District Attorney
8 and his assistants, wherein the indictment, the evidence to be
9 presented to the jury, and legal questions concerning the indict-
10 ment and trial were discussed. The affiants further averred that
11 the judge had expressed a personal opinion concerning the guilt
12 of the affiant, and had given advice and assistance to the
13 District Attorney and members of the Department of Justice. A
14 second conference followed in which the judge allegedly expressed
15 a further prejudicial opinion. The affiant also alleged pre-
16 judgment of legal questions affecting his rights, and stated that
17 the judge held opinions personally hostile and antagonistic to
18 the affiant. 115 F.2d at 397-398. The allegations in the
19 Schmidt case indeed raised serious questions of pre-judgment and
20 personal prejudice. They in no way bear any similarity to the
21 facts before this Court.

22 Similarly, in Nations v. United States, 14 F.2d 507
23 (8th Cir.) cert. denied, 273 U.S. 735 (1926), (Defendants' Brief,
24 p. 49), the Eighth Circuit Court of Appeals ruled that it was
25 error for the District Court judge to proceed with the trial. In
26 Nations, the Affidavit stated that individuals connected with the
27 Government, and having a special interest in the prosecution,
28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 25

1 communicated facts and circumstances about the charges to the
2 Court and that the Court had formed and expressed its opinion
3 that the Defendant was guilty of the charges. Again, the state-
4 ments in the Affidavit before this Court are in no way analagous
5 to the facts of the Nations case.

6 Defendants quote Wolfson v. Palmieri, 396 F.2d 121, 124
7 (2nd Cir. 1968), for the proposition that "... to establish the
8 extra-judicial source of bias and prejudice would often be diffi-
9 cult or impossible and this is not required." (Defendants' Brief
10 at p. 50.)

11 The Wolfson case by no means dispenses with the pre-
12 sumption of impartiality. As the Court stated at 396 F.2d at
13 126:

14 "But in the absence of proof there should
15 be at least a presumption that the trial
16 court will conduct an errorless trial;
17 that with skilled trial counsel in the case
18 he will avoid participation in the examination
19 of witnesses except in the interest of clarity;
20 that he will not by demeanor indicate any
21 personal or hostile attitude toward the
22 witnesses or the case; and that he will state
23 fairly the issues in his charge. Like all pre-
24 sumptions, it should remain in effect until
25 it is overcome by adequate proof. At the
26 same time, the courtroom should not be made
27 the arena for a contest wherein the contest-
28 ants are the Judge and the Defendant. In
this delicate field, the matter must largely
be left to discretion as the facts in each case
dictate."

1 In the Wolfson case, the Second Circuit Court of Appeals
2 held that the petitioners failed to make a sufficient showing to
3 warrant disqualification of the judge. The Court ruled that the
4 comments and rulings on which the affiants relied were not
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6 Pltfs.' Memo. of Points & Auth.
7 in Opp. to Mtn. to Disqualify
8 Hon. George H. Boldt - P. 26

1 sufficient to show partiality of judgment.

2 It is significant, although not surprising, that not
3 one decision from the Ninth Circuit Court of Appeals is cited in
4 Defendants' Memorandum. It is not surprising, because the law in
5 this Circuit (as in all circuits) requires the denial of Defen-
6 dants' Motion.

7 Defendants maintain that the alleged ex parte contacts
8 indicate personal bias. Accepting arguendo, that those contacts
9 did occur, personal bias is not shown.

10 In Willenbring v. United States, 306 F.2d 944 (9th Cir.
11 1962), an income tax evasion prosecution, appellant contested the
12 trial judge's refusal to disqualify himself, pursuant to 28 U.S.C
13 §144, based on allegations that the judge had a conference about
14 the case with the Assistant U. S. Attorney, without affiant's
15 attorney being present.

16 The Appellate Court ruled that the allegations did not
17 show personal bias or prejudice, nor did they suggest or imply
18 that any improper conduct occurred during the conference, or that
19 the merits of the case had been discussed. The Court rejected
20 allegations in the Affidavit that the judge had made up his mind
21 about Defendant's guilt or that he had personal bias against the
22 Defendant, ruling that the allegations were conclusions, not
23 statements of fact. See also Scott v. Beams, 122 F.2d 777 (10th
24 Cir. 1941), cited with approval by the Ninth Circuit in Willenbring,
25 supra.

26 In Botts v. United States, 413 F.2d 41 (9th Cir. 1969)
27 the affiant appealed the trial judge's ruling that the Affidavit
28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
HOn. George H. Boldt - P. 27

1 was legally insufficient. The Affidavit alleged that the judge
2 was biased and prejudiced because he [the judge] "directly or in-
3 directly through his secretary or clerk has or may have made
4 statements to or discussed matters 'relating to the issues in-
5 volved in the case with federal officials and a Honolulu newspaper,
6 without the knowledge, consent, or presence of the Plaintiff.'" 413 F.2d at 43.

7 The Ninth Circuit Court of Appeals ruled that the
8 allegations were insufficient because the words "or may have"
9 actually changed the allegation into a charge that the judge
10 might have made the asserted statements. The Court further
11 stated: "[I]n addition, even if such remarks were made, there is
12 no reason to believe, on the basis of the Affidavit, that they
13 were prejudicial to Plaintiff. . .To be disqualifying, the alleged
14 bias and prejudice 'must stem from an extra-judicial source and
15 result in an opinion on the merits on some basis other than what
16 the judge learned from his participation in the case.'" (Citations
17 omitted) 413 F.2d at 43.

18 In Smith v. Insurance Company of North America, 213 F.
19 Supp. 675 (M.D. Tenn. 1962), cert. denied, 380 U.S. 815, modified
20 on other grounds, 334 F.2d 673 (6th Cir. 1964), the District
21 Court ruled that the Affidavit was not timely, and that allegations
22 that the Court had suggested to Defendant's counsel that he
23 should discuss settlement with the affiant's co-Plaintiffs and
24 that the conference was held in chambers in the absence of Plaintiff
25 or Plaintiff's counsel, that a settlement was reached, and that
26 the judge declined to confirm that he presided over the negotiations,
27 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 28

1 did not support a conclusion that the Court acted with bias or
2 prejudice. 213 F.Supp. at 699. The Court noted that the negoti-
3 ations were conducted at arms' length and that the interest of
4 the adverse parties were protected by diligent counsel. The Court
5 stated:

6 "Even ex parte conferences with
7 counsel for one party would not
8 necessarily indicate bias."
(Citations omitted) 213 F.Supp.
at 700.

9 The Court also considered the affidavit, absent the
10 application of 28 U.S.C. §144. The Court, ruling that it had
11 examined its conscience and found no bias or prejudice, stated:

12 "[U]nless its belief in the correctness
13 of decisions heretofore made for and
14 against the parties at various issues on
15 the basis of the facts and law pre-
16 sented for its adjudication constitute
17 a bias. If that were a bias requiring
18 withdrawal of the judge no case could be
19 litigated to a conclusion before a single
20 judge." 213 F.Supp. at 700.

21 It has been clearly established in this Circuit that
22 personal bias must be of extra-judicial origin. In United States
23 v. Jackson, 430 F.2d 1113 (9th Cir. 1970), the Court of Appeals
24 ruled that allegations that the judge revoked Defendants' bail,
25 after receiving information from government attorneys that Defen-
26 dants had threatened witnesses, did not demonstrate personal bias
27 or prejudice.

28 In Grimes v. United States, 396 F.2d 331 (9th Cir.
1968), the Ninth Circuit ruled that allegations that the Magistrate
was biased against Defendants who committed the crime with which

Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 29

1 Defendant was charged, and against the racial group of which
2 Defendant was a member, did not show personal bias. See,
3 In Re: Webster, 382 F.2d 79 (9th Cir. 1967); Harris v. United
4 States, 338 F.2d 75 (9th Cir. 1964); Lyons v. United States, 325
5 F.2d 370 (9th Cir. 1963); Los Angeles Tr. D. & M. Exch. v. Securities
6 & Exch. Com'n, 285 F.2d 162 (9th Cir. 1960). See also, Laird v.
7 Tatum, 409 U.S. 824, 34 L.Ed.2d 50, 93 S.Ct. 7 (1972); United
8 States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d
9 778 (1966); United States v. Dodge, 538 F.2d 771 (8th Cir. 1976);
10 United States v. Jeffers, 532 F.2d 1101 (7th Cir. 1976).

11 Defendants have also alleged that this Court's personal
12 friendship with one of Plaintiffs' counsel supports charges of
13 impropriety, personal bias and prejudice. It would be preferable
14 to ignore this patently absurd charge, rather than to dignify it
15 with a response. However, as officers of the Court, it is the
16 responsibility of Plaintiffs' counsel to reply.

17 A Court's friendship with counsel has often been
18 rejected as insufficient to show personal bias. See, e.g.,
19 Parker Precision Products Co., Inc. v. Metropolitan Life
20 Insurance Co., 407 F.2d 1070, 1077; Broome v. Simon, 255 F. Supp.
21 434, 438 (W.D. La. 1965).

22 As the district judge in Firnhaber v. Sensenbinger, 385
23 F.Supp. 406 (E.D. Wis. 1974), when confronted with allegations of
24 bias based on personal friendship with Defendants' associates,
25 said:

26 "If this were the appropriate standard
27 for determining when recusal is neces-

28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 30

sary, either very few cases could be heard by the federal judiciary, or federal judges would be rendered hermits upon their appointment." 385 F.Supp. at 412.

In Parish v. Board of Com'rs. of Alabama, 524 F.2d 98 (5th Cir. 1976), cited by Defendants, (Defendants' Brief p. 46), the Affidavit alleging bias and prejudice included allegations that the judge was a friend of Defendants and Defendants' counsel. In affirming the trial judge's denial of the Motion To Disqualify, the Appellate Court said:

"The allegation of lack of impartiality stemming from Judge Varner's acquaintanceship or friendship with witnesses and defense counsel is likewise tenuous. It does not exceed what might be expected as background or associational activities with respect to the usual district judge. As a factual basis the allegations fall short of supporting an inference of lack of impartiality under §455(a)." 524 F.2d at 104.

Impartiality is clearly demanded of our judiciary. However, no Court has ever held that a friendship may not exist between a judge and an attorney. It is respectfully suggested that if such friendships were a basis for disqualifying a judge, the federal bench would soon be empty.

III.

THE AFFIDAVITS HAVE NOT BEEN FILED BY A PARTY TO THIS PROCEEDING

Section 144 of Title 25 requires the affidavits to be filed by a party to the proceeding. The law in this Circuit is that Affidavits of Defendant's attorney, filed with a Motion To Pltfs.' Memo. of Points & Auth. in Opp. to Mtn. to Disqualify Hon. George H. Boldt - P. 31

Disqualify a judge for personal bias, do not satisfy the statutory requirement of a "party to the proceeding," Giebe v. Pence, 431 F.2d 942 (9th Cir. 1970). See United States Ex Rel Wilson v. Coughlin, 477 F.2d 100 (7th Cir. 1973); Bumpus v. Uniroyal, Inc., 385 F.Supp. 711 (E.D. Pa. 1974). See also Anchor Grain Co. v. Smith, 297 F. 204 (C.C. Tex., 1924) (a corporate president is not the "party" where the corporation is named as the Plaintiff or Defendant).

The affidavits in the instant case were filed by the following individuals: Two attorneys for Defendant Amstar Corporation; Vice President and General Counsel for Defendant Amstar Corporation; counsel for Defendant U and I Incorporated; Director of Legal Affairs for U and I Incorporated; counsel for Defendant Amalgamated Sugar Co.; and Vice President and general counsel for Defendant Great Western. No Affidavit has been filed by a party to this proceeding, and, on that basis alone, the Motion to Disqualify pursuant to 28 U.S.C. §144 can be denied. Giebe v. Pence, supra.

The averments of the Affidavits would also be legally insufficient, even if they had been filed by the proper parties.

IV.

THE AFFIDAVITS HAVE NOT BEEN TIMELY FILED

The time for filing this Motion had expired ten months before September 23, 1976, back in December of 1975 when Defendants first began to threaten disqualification. As a matter of fact, it even expired three years earlier than that, insofar as Pltfs.' Memo. of Points & Auth. in Opp. to Mtn. to Disqualify Hon. George H. Boldt - P. 32

1 the allegation that the Court and Mr. Ferguson are friends
2 is concerned, because that was known when the 1812 litigation
3 was originally filed.

4 Initially, it must be noted that Defendants'
5 affidavits confirm that they viewed the acts now complained
6 of as improper in December, 1975 when they went to Tacoma.
7 (See Affidavit of John M. Wunderli, page 2, paragraph 5, for
8 example). Ignoring Defendants' constant, informal harping
9 on this subject, they waited nine (9) months before formally
10 bringing this matter on for resolution. Finally, on September 13,
11 Mr. Raven notified Mr. Cooper that defendants intended to
12 again request that Judge Boldt recuse himself, but refused
13 to inform the Court by telephone when he was unavailable for
14 a personal conference. Rather, Defendants waited ten (10)
15 days until a hearing had been scheduled in Boston. Even
16 after the Boston meeting, Defendants waited almost one full
17 month before filing their motion, notwithstanding Mr. Kohn's
18 statements in Boston that their motion was already untimely.
19 When filed, Defendants' motion trailed the alleged incident
20 of Pretrial Order No. 12 by two (2) months, and the alleged
21 Fertilizer incident by approximately six (6) weeks. This
22 total lack of concern over a matter of this import, which
23 was already some nine (9) months old, and which had previously
24 been the subject of Defendants' complaint, demonstrates
25 defendants' complete disregard for the timely resolution of
26 a matter which requires prompt attention.

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30 P.tfs.' Memo. of Points & Auth.
31 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 33

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1 Finally, the allegation as to an agreement at the
2 Boston conference is a plain, bald, mis-statement of fact.
3 Mr. Raven suggested that there be such an agreement, but Mr.
4 Kohn immediately stated that Plaintiffs who were interested
5 parties, would not make any such agreement, that the time
6 for filing had long since passed and was now barred, and
7 cited cases to that effect. Kohn stated that there was no
8 basis for filing in any event, because none of the grounds
9 that Mr. Raven mentioned was a ground for disqualification.
10 Mr. Raven then replied that he did not have to be educated
11 by Plaintiffs as to the law and would do his own legal
12 research before filing.

13 Defendants, citing at p. 44 of their Brief, Bradley v.
14 School Board of City of Richmond, Va., 324 F. Supp. 439 (E.D. Va.
15 1971) argue that they have acted "with reasonable diligence in
16 the present case." Plaintiffs respectfully submit that assertion
17 is erroneous as a matter of fact and of law.

18 In the Bradley case, affidavits were filed stating
19 that the judge, sitting in a school desegregation case, had
20 written a letter to Plaintiff's counsel suggesting that it might
21 be appropriate for the school board to discuss with officers of
22 other counties the feasibility of consolidating the school
23 districts, and that subsequent to that letter a motion was filed
24 incorporating the judge's suggestions. The judge refused to
25 recuse himself and ruled that his letter pointed to a course of

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31 Pltfs.' Memo. of Points & Auth.
32 in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 34

1 conduct to facilitate the progress of the litigation.

2 In Bradley, the affidavits were filed thirty days after
3 the movants were added as Defendants. Although the Bradley Court
4 did not base its decision on timeliness, the trial judge stated
5 that "there should have been little delay in filing of any such
6 motion after acquiring standing to file such motion." 324 F.Supp.
7 at 443.

8 The Bradley Court cited Faubus v. United States, 254 F.
9 2d, 797 (8th Cir. 1958). In that case, Governor Faubus filed an
10 affidavit of prejudice against the presiding judge nine days after
11 the Governor had been named a party Defendant. The Court held
12 that the affidavit was not timely.

13 The Bradley Court also cited Eisler v. United States,
14 170 F.2d 273 (D.C. Cir. 1948) in which the Court held that a
15 nine-day delay before filing Affidavits, after the affiant learned
16 the identity of the trial judge, was untimely.

17 It is clearly settled in this Circuit, as it is through-
18 out the federal courts, that the timeliness requirement of 28
19 U.S.C. §144 must be strictly applied.

20 In Chessman v. Teets, 239 F.2d 205 (9th Cir. 1956)
21 reversed on other grounds, 345 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d
22 1253 (1956), the appellant filed an affidavit pursuant to 28
23 U.S.C. §144. The Affidavit was based upon facts of which the
24 appellant was aware on November 30, 1955. The Affidavit was
25 filed on December 29, 1955. The Appellate Court ruled that the
26 Affidavit was filed too late. See also, Morrow v. Topping, 437
27 F.2d 1155 (9th Cir. 1971).

28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 35

1 In Knoll v. Socony Mobil Company, 369 F.2d 425 (10th
2 Cir. 1966), the order setting the case for trial on February 28,
3 1966, was entered on January 12, 1966. The Affidavit under 28
4 U.S.C. §144, was filed on February 16, 1966. The District Court
5 ruled that the request was not timely made. The Appellate Court
6 affirmed that ruling.

7 The Sixth Circuit, in Reifer v. Lansing Drop Forge Co.,
8 124 F.2d 440 (6th Cir. 1942) considered an affidavit, filed
9 July 3, 1941, under the predecessor statute of 28 U.S.C. §144.
10 The affiant had knowledge of the alleged bias and prejudice by
11 June 17, 1941. The Court ruled that the affidavit was legally
12 insufficient and that the application was not timely filed.

13 Stringent construction of the time requirement of 28
14 U.S.C. §144 prevents litigants from trying "to sample the temper
15 of the Court before deciding whether to file the affidavit."
16 Hall v. Burkett, 391 F.Supp. 237 (W.D. Okla. 1975), citing
17 Peckham v. Ronrico Corp., 288 F.2d 841 (1st Cir. 1961). See
18 also Bumpus v. Uniroyal Tire Co., Div. of Uniroyal, Inc., 385 F.
19 Supp. 711 (E.D. Pa. 1974) (filing two weeks to two months after
20 circumstances allegedly demonstrating bias, held untimely).

21 Defendants rely on so-called cumulative incidents
22 creating a "pattern of judicial conduct," (Defendants' Brief,
23 p. 44), which culminated on September 9, 1976. We respectfully
24 submit that that reliance is misplaced and cannot excuse
25 Defendants' delay in submitting their Affidavits to this Court.

26 In Duplan Corp. v. Deering Milliken, Inc., 400 F.Supp.
27 497 (D.C. S.C. 1975), the moving party also relied on the

28 Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 36

1 cumulative nature of a series of facts allegedly supporting dis-
2 qualification. In ruling that the Affidavit was not timely filed,
3 the trial court observed that whenever there is reliance on
4 cumulative facts, the moving party must act even with "greater
5 expedition" than that which is normally necessary. The Court
6 also stated:

7 "Timeliness is essential to any recusal
8 motion. To be timely, a recusal motion
9 must be made at counsel's first opportunity
10 after discovery of the disqualifying facts."
(Emphasis in the original) 400 F.Supp. at
11 510.

12 Defendants maintain that their oral statements to the
13 Court, at the hearing on September 23, 1976, preserve the timeli-
14 ness of their Affidavits. The affiants, in Brotherhood of Loc.
15 Fire and Eng. v. Bangor and Aroostock R. Company, 380 F.2d 570
16 (D.C. App. 1967) cert. denied, 389 U.S. 970, 88 S.Ct. 437, 19 L.
17 Ed.2d 983 (1968), also contended that oral statements, made
18 during a temporary restraining order proceeding, would suffice
19 to preserve the timeliness of a Motion To Disqualify under
20 28 U.S.C. §144. The Defendants filed a motion, under 28 U.S.C.
21 §144, on April 22. The District of Columbia Court of Appeals
22 ruled that oral requests made on March 28, March 31, and April 2,
23 1966, were not sufficient to comply with the timeliness require-
24 ment of 28 U.S.C. §144. Although the Appellate Court did not
25 base their decision on the issue of timeliness, the language is
26 clearly applicable to the instant case.

27
28 Pltfs.' Memo. of Points & Auth.
In Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 37

1 CONCLUSION

2 Defendants' Affidavits are untimely. The Affidavits
3 have not been submitted by a "party" to the proceeding, as
4 required by the statute. The Affidavits are legally insufficient
5 in that neither personal bias, nor prejudice, or appearance of
6 impropriety or partiality has been established.

7 This Court would not be complying with its judicial
8 responsibility to the parties in this litigation if it were
9 to grant the Motion To Disqualify.

10 Dated this 15th day of November, 1976.

11
12 Respectfully submitted,

13 WM. H. FERGUSON, ESQ.
14 THOMAS J. GREENAN, ESQ.
15 FERGUSON & BURDELL
16 1700 Peoples National Bank Bldg.
17 Seattle, Washington 98171
18 Counsel for 1812 Plaintiffs

19 By Wm H Ferguson

20 HAROLD E. KOHN, ESQ.
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23 1700 Market Street
24 Philadelphia, Pennsylvania 19103
25 Counsel for Home Juice Company
26 and Bodine's, Inc.

27 WILLIAM L. DWYER, ESQ.
28 CULP, DWYER, GUTERSON & GRADER
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Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 38

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Pltfs.' Memo. of Points & Auth.
in Opp. to Mtn. to Disqualify
Hon. George H. Boldt - P. 39

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

MASTER FILE
MDL-201

ALL ACTIONS

AFFIDAVIT OF WM. H. FERGUSON

STATE OF WASHINGTON)
County of King) ss.

I, WM. H. FERGUSON, being first duly sworn, depose
and say:

I am a member of the State Bar of Washington, an
attorney of record for 1812 Distributing Corporation, et al.,
plaintiffs in the Sugar Antitrust Litigation, and Chairman
of the Plaintiffs Steering Committee in those consolidated
proceedings.

I have read the motion to disqualify and the memo-
randum of points and authorities in support of the motion to
disqualify the Honorable George H. Boldt, as well as the
affidavits of counsel attached thereto, and submit this
affidavit in opposition to such motion.

The 1812 Distributing Corporation case was filed in

p. 1, Affidavit of WHF

EXHIBIT A

1 the Western District of Washington on the 4th day of October 1972,
2 and I have participated in said litigation actively at all
3 times since said date.

4 At the time the questions of consolidation relating
5 to the Sugar litigation were heard by the Judicial Panel on
6 Multidistrict Litigation, the Ferguson & Burdell firm, as
7 attorneys for the plaintiffs in the 1812 litigation, took no
8 position with respect to transfer for the reason that we
9 were uncertain where the best interests of the plaintiffs lay.

10 The Ferguson & Burdell policy has continuously been to oppose
11 transfer if we felt it was not in our client's best interest.

12 See: In re Antibiotic Drug Litigation, 301 F.Supp. 1158
13 (J.P.M.L. 1969); In re Western Liquid Asphalt, 309 F.Supp. 157
14 (J.P.M.L. 1970) [1970 Trade Cases ¶73,051]; In re Olympia Brewing
15 Co. Antitrust Litigation, 1976 - 1 Trade Cases ¶60,946 (J.P.M.L.
16 1976).

17 I met with Robert D. Raven and Peter Byrnes, attorneys
18 for AmStar Corporation in this litigation, on July 7, 1975.
19 During this meeting they inquired whether or not we intended to
20 oppose transfer of the 1812 case to San Francisco for consoli-
21 dation with other pending Sugar cases. I informed them that
22 we were not going to oppose transfer because we felt it was in
23 our clients' best interest that the case be transferred. I
24 did not specify the reasons for this opinion, but I had been
25 talking with most of the plaintiffs' counsel in these cases
26 during the preceding days and was more than satisfied with
27 the quality and quantity of these attorneys. I was particu-
28 larly pleased in the amount of manpower that would be avail-
29 able to the plaintiffs as contrasted to what had been available
30 during the preceding two or three years in the 1812 case.

31 At this same meeting I was asked if I had any knowledge

1 of Judge Boldt's thinking on the matter of the 1812 case. I
2 informed them that a few days prior thereto I had had a conver-
3 sation with Judge Boldt in which he advised me, without any
4 inquiry on my part, that his tentative thinking was that to
5 keep the 1812 case in Tacoma and run it on a separate track
6 would be inconsistent with the letter and spirit of Section 1407.
7 Mr. Raven and Mr. Byrnes told me they appreciated that infor-
8 mation and no complaint about that conversation was ever made
9 until this motion to disqualify was filed. At the time the
10 transfer was made by Judge Boldt, which was done in open court,
11 both Mr. Raven and Mr. Byrnes and other attorneys for defendants
12 in the 1812 case were present in court, and no objection was made.

13 I had been selected as chairman of the Plaintiffs
14 Steering Committee at a meeting of all plaintiffs' counsel on
15 July 7, 1975. Prior to the convening of the pretrial conference
16 on that date, Mr. Harold Kohn and I asked the defendants for
17 their permission for the two of us to have a private conver-
18 sation with Judge Boldt about the plaintiffs' organization.
19 The defendants granted this request. Mr. Kohn and I, in
20 chambers, informed Judge Boldt that I had been elected chairman
21 of an ad hoc Steering Committee consisting of 19 persons
22 whose names we gave him. We requested his approval of this
23 Steering Committee. Judge Boldt listened to this explanation
24 and then advised us that he would like to speak to the
25 plaintiffs as a group privately before he gave us any response.
26 Judge Boldt came into the court room and informed the defendants
27 he would appreciate their stepping outside because he wanted
28 to talk to all of the plaintiffs alone for a moment. Judge
29 Boldt then told the plaintiffs that he would approve this
30 committee but reserve the right, if it became unwieldy or was
31 not working properly, to make such changes as might be indicated.

1 At the conclusion of the pretrial conference the
2 Court requested plaintiffs and defendants to prepare and submit
3 an agreed Pretrial Order No. 1 covering the matters decided at
4 the pretrial conference, hopefully having it ready for his
5 signature when he would be in San Francisco for the Ninth
6 Circuit Judicial Conference during the latter part of that
7 month. As a result of discussions between representatives
8 of defendants and plaintiffs, who were principally Mr. Josef
9 Cooper and myself on behalf of plaintiffs, an agreed pretrial
10 order was ready for presentation shortly prior to July 24, 1975.
11 As I was also attending the Judicial Conference and had a room
12 at the Fairmont Hotel where the conference was being held,
13 arrangements were made with Mr. Stephen Bomse, who was acting
14 as chairman for the defendants, to meet with Judge Boldt, Mr.
15 Cooper and myself during the Conference morning recess, at
16 approximately 10:45 on the morning of July 24, 1975. The
17 meeting was held in my room because it appeared to be the
18 most convenient place. No objection to meeting in my room
19 was ever made until I read the defendants' motion. Mr. Cooper
20 had informed me that he might be late for the meeting because
21 of a previous medical appointment, and we should proceed without
22 him if necessary. At the appointed hour for the meeting
23 Judge Boldt and I went to my room and were joined there, within
24 one or two minutes, by Mr. Bomse. No objection was made then,
25 or at any time, until the filing of this motion, that Judge
26 Boldt and I had been alone in my hotel room.

27 The original agreed Pretrial Order had been delivered
28 to me at the Fairmont Hotel prior to the meeting. In the
29 presence of Mr. Bomse and myself, but before Mr. Cooper
30 arrived, Judge Boldt read the proposed order. The Court noted
31 that neither the plaintiffs nor the defendants Steering

1 Committees had designated the chairmen as such, although both
2 Mr. Bomse and I were members of our respective Steering
3 Committees, and Judge Boldt said that he wanted to have the
4 chairmen designated so that he had someone with authority
5 with whom to speak. He reiterated in substance his statement
6 on page 100 of the Transcript of July 8, 1975, which reads
7 as follows:

8 "If something arises that seems to be of
9 sufficient importance, we can set up a tele-
10 phone conference call on it, or we can have
11 a meeting with representative counsel at
12 Tacoma or some other arrangement that will
13 not require everyone all over the country
14 to attend. I leave this to the Coordinator
15 for defendants and the Chairman of the
16 Steering Committee, Mr. Ferguson."

17 The Court then signed Pretrial Order No. 1. Shortly
18 thereafter Mr. Cooper arrived and informed the Court that he
19 would file the proposed Pretrial Order, at which time the Court
20 instructed Mr. Cooper that before filing the Pretrial Order he
21 insert the word "Chairman" after Mr. Bomse's name and my name
22 on the respective Steering Committees.

23 Pretrial Order No. 2 was an agreed order that was ready
24 for the Court's signature on August 18, 1975. The Court had
25 been sitting in Tacoma and had indicated he would be available
26 for presentation at approximately 11:00 a.m. on that day but
27 be absent from the district for approximately ten days thereafter.
28 On August 17, 1975 I had a telephone conversation with Mr. Stephen
29 Bomse regarding the presentation of this order, at which time I
30 informed him of these facts and that it was Judge Boldt's custom
31 to have informed representatives of both sides appear at these
presentations so that the Court could ask questions if
needed. I asked Mr. Bomse if he intended to come to Tacoma
for the presentation, and suggested to him that if he had any
problem, since defendants in the 1812 and other Northwest

1 cases had four Seattle defense law firms representing them, he
2 select one of their number as his representative and brief him
3 on the subjects covered by the Pretrial Order so that he could
4 properly represent the defendants. Mr. Bomse informed me
5 that he would call me the first thing on the morning of
6 August 18 and advise me of how he wanted the presentation
7 handled. Not having heard from Mr. Bomse by 10:00 a. m. on
8 the 18th, I again called Mr. Bomse, but was referred to his
9 associate, Mr. Lawrence Keeshan, who advised me that Mr. Bomse
10 had left the city and had made no arrangements for the presen-
11 tation. I told Mr. Keeshan that we could not delay the
12 presentation for ten days, that I would personally present
13 the order to Judge Boldt and advise him what had happened.
14 I did present the order to Judge Boldt and immediately there-
15 after telephoned Mr. Keeshan, and followed the telephone con-
16 versation up with the letter that is marked Exhibit A
17 of defendants memorandum. Approximately one week later I
18 received the letter from Mr. Bomse, marked Exhibit B in the
19 memorandum. I did not respond thereto for the reason that I
20 did not want to continue a letter writing contest with my opposite.
21 There was no pretrial conference held on this date, and there
22 were no matters discussed, except as reported to Mr. Keeshan

23 The reference by Mr. Harold Kohn in a subsequent
24 motion to a Second Pretrial Conference on August 18, 1975, was
25 an obvious error, and was referring to the signing of
26 Pretrial Order No. 2, which did set forth a schedule which
27 was not in controversy. At the time Harold Kohn made the
28 statement he had no knowledge of conversations and letters
29 between Mr. Bomse's associate, Mr. Bomse or myself. The
30 matters ruled on by the Court on September 26, 1975 related
31 to defendants' discovery on the class action motions, and

p. 6, Affidavit of Wm. H. Ferguson

246

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1 particularly the limitation of the number of depositions that
2 could be taken by the defendants, the notice of which depo-
3 sitions was first given on September 17, 1975 (almost one month
4 after the alleged pretrial conference) and could not have been
5 the subject of conversation between Judge Boldt and myself on
6 August 18, 1975. Defendants were permitted, on September 26,
7 1975, to take approximately 25 class action depositions.

8 In November 1975, the exact date of which I now have
9 no recollection, I received a telephone call from Mr. Rayner
10 Hamilton from New York. Mr. Hamilton was the attorney for
11 Holly Sugar, with whom we had negotiated a settlement agreement.
12 Mr. Hamilton informed me that his company had just given a
13 statement to the press on the Holly settlement at the request
14 of their securities attorney, and that he was concerned that
15 Judge Boldt might read it in the national press. He was
16 concerned about this making an adverse impression against
17 Holly Sugar with the Court. Mr. Hamilton also said that the
18 information furnished the press was very scant and consisted
19 principally of the dollar amount of the settlement.

20 After a discussion of the matter, it was agreed that
21 I would call Judge Boldt and inform him of the settlement, but
22 give him no details except the amount of the settlement and
23 the reason we were calling it to his attention, i. e., Holly's
24 press release. I also informed the Court that we were negotiating
25 with two other defendants and that I would take up with him a
26 proposal for presentation of these settlements at some time
27 in the future after he returned to Tacoma. Judge Boldt
28 requested that I give him no information about details of
29 the settlements. I did not do so.

30 I have read the Court's statement at the Fertilizer
31 hearing about the lodging of the settlement under seal with

p. 7, Affidavit of Wm. H. Ferguson

247

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1 the Clerk, and it is my belief that this conversation did not
2 occur during the aforesaid telephone conversation but occurred
3 approximately two weeks later at a conference in the Court's
4 chambers on December 9, 1975, attended by Messrs. Raven,
5 Kirkham, Bomse, Kohn and I, when the Court had a schedule for
6 consideration of the Holly settlement before it, with a copy
7 of the agreement attached, and the matter was under discussion
8 by the non-settling defendants. Mr. Raven admits knowledge of
9 the telephone call on page 2, line 10 of his affidavit, and
10 indicates he received the information from Mr. Hamilton on
11 or about November 24, 1975, which would be within a few days
12 of the making of the telephone call above referred to.

13 There never was an "in chambers conference" scheduled
14 without the presence of the non-settling defendants. To my
15 knowledge, neither Judge Boldt nor I ever agreed to attend any
16 conference from which the non-settling defendants were to be
17 excluded. There were discussions of various methods of processing
18 settlements, primarily among some of the attorneys for the plain-
19 tiffs, but the method finally chosen by counsel was to serve a
20 proposed schedule of events, attaching thereto a copy of the
21 Holly settlement.

22 In discussions with defendants over the agenda for the
23 December 9-10 Pretrial Conference, plaintiffs indicated they wished
24 to take up the matter of handling the proposed settlements. That
25 matter was placed on the proposed agenda submitted to the Court.
26 In furtherance thereof, the proposed schedule of events was served
27 on the defendants and filed with the Clerk of the Court in San
28 Francisco, although I was not aware of said filing until receipt of
29 this motion of defendants. Judge Boldt was not sent a copy of the
30 schedule or the attached settlement agreement, but a copy of both
31 said documents was left for the Court at his hotel at some time

p. 8, Affidavit of Wm. H. Ferguson

1 prior to his leaving for the Court on the morning of December 9,
2 1975. During a preliminary meeting in chambers prior to the
3 commencement of the pretrial conference, Judge Boldt had the
4 packet in hand. He advised all parties he had not had a
5 chance to read any of it and added, "as Mr. Raven well knows,"
6 inferring that Mr. Raven had been present at his hotel when he
7 had picked up the packet and had come directly to the Court-
8 house and then into the pretrial conference meeting.

9 Mr. Raven and Mr. Kirkham requested Judge Boldt not
10 to read the settlement documents until he had disposed of the
11 class action motion. Judge Boldt assured both of them that
12 he would grant their request, that he would seal the documents
13 and not look at them until he had the permission of all parties.

14 Mr. Raven then mentioned the Lee Freeman letter and
15 asked Judge Boldt if he had received it. Judge Boldt said
16 he had received the letter, had merely scanned it, realized
17 that it was in the nature of a complaint and felt that this
18 was not the best method of making a complaint. Therefore,
19 he made no response, not even an acknowledgment of receipt
20 for the reason that he felt he could say no more than
21 "receipt is hereby acknowledged of your letter of November 26,
22 1975," and he did not like to do that to a person he had
23 known as long as Lee Freeman. Neither the Court nor I made
24 any comment about the consumer class action. Harold Kohn
25 made a statement that consumer classes of this kind were not
26 being granted, but the entire statement by Mr. Kohn on con-
27 sumer classes did not last more than half a minute. The
28 entire conference did not last over fifteen minutes.

29 When I read footnote 7 of defendants' memorandum,
30 I learned for the first time that the schedule with the Holly
31 settlement attached had been filed. I called Josef Cooper,

p. 9, Affidavit of Wm. H. Ferguson

1 Coordinating Counsel of Plaintiffs Steering Committee, on the
2 telephone to determine if the statement was correct. He informed
3 me that he would send a paralegal to the Clerk's office in San
4 Francisco to search the Sugar files, and verify the time, date
5 and method of filing. There is no indication as to when the
6 defendants discovered said filing, but it is at least inferred
7 that they discovered it after reading the transcript in the
8 Fertilizer case.

9 Mr. Raven and Mr. Kirkham requested a conference in
10 Judge Boldt's chambers in Tacoma which had been prearranged for
11 December 22, 1975. Mr. Peter Byrnes, one of the attorneys for
12 AmStar Corporation in the 1812 case, also attended on behalf of
13 the defendants. The plaintiffs were represented by Josef Cooper,
14 Albert Malanca and me. Although I asked to know the purpose of
15 the conference, the defendants refused to advise me thereof until
16 we met prior to the designated hour of the Court's conference in
17 Mr. Malanca's office in Tacoma. At that time, one of their
18 representatives informed us that the purpose of the conference
19 was to ask Judge Boldt to recuse himself, stating he had been
20 prejudiced by receiving information about the Holly settlement
21 and by receipt of the Freeman letter. After a very short conference
22 in Mr. Malanca's office, the six of us went to Judge Boldt's
23 chambers and met with the Court without the presence of a court
24 reporter at the request of defendants. Mr. Mark Christianson, at
25 that time Judge Boldt's law clerk, also attended. Mr. Raven
26 stated that the defendants felt Judge Boldt should recuse himself
27 and act as a settlement judge only in the future. Judge Boldt
28 told us that if there were to be two judges, one handling settle-
29 ments and the other handling litigation, he would opt for the

30 . . .
31 . . .
p. 10, Affidavit of Wm. H. Ferguson

1 position of litigating judge, but that he had been assigned these
2 cases for all purposes. He further stated that he never had
3 received any details of these settlements except as to the
4 amount; that there was nothing he knew of that would interfere
5 with his ruling on the class motions or handling any part of the
6 litigation as far as he could foresee; and that he was not
7 inclined to accept their suggestion. The Court did not tell the
8 parties he would take their suggestion under advisement. On the
9 contrary, he told the attorneys for the defendants that he would
10 give them fair, impartial treatment and full consideration of
11 their contentions. At the conclusion of the conference, Mr.
12 Raven indicated he was satisfied with the Court's assurances.

13 The statement referred to by defendants in the
14 order of August 25, 1976 was inserted by the Court, after
15 the order was presented, as a result of efforts by defense
16 counsel to get the Court to infer in said order that it had
17 previously read the Holly settlement, contrary to many
18 explicit statements in chambers and on the record that the
19 Court had not done so.

20 There is no evidence in this record that the Court
21 has ever rendered any decision in favor of or against
22 parties litigant as a result of bias in my favor. There is
23 affirmative evidence in other litigation that our relation-
24 ship, whatever it may be, has not resulted in any bias or
25 prejudice in my favor. See Arnhold v. United States,

26 . . .
27 . . .
28 . . .
29 . . .
30 . . .
31 . . .

p. 11, Affidavit of Wm. H. Ferguson

(9th Cir. 1955) 225 F.2d 649; Rayonier, Inc. v. United States (1956)
352 U.S. 315, 1 L.Ed.2d 354, 77 S.Ct. 374; Arnhold v. United
States, (9th Cir. 1960) 284 F.2d 326; Beck v. United States,
(9th Cir. 1962) 298 F.2d 622.

All the matters complained of by the defendants in
their memorandum and affidavits occurred prior to December 22,
1975 and were all known to the defendants prior to the recusal
conference of that date.

Further affiant sayeth not.

Wm. H. Ferguson
Wm. H. Ferguson

SUBSCRIBED AND SWORN to before me this 11th day of November, 1975

James J. Sullivan
Notary Public in and for the State of
Washington, residing at Bellevue.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
IN RE SUGAR ANTITRUST LITIGATION) Master File No.
MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

AFFIDAVIT OF JOSEF D. COOPER

I, JOSEF D. COOPER, first being duly sworn, do
hereby depose and say:

1. I am a member of the Bar of the States of
California, Illinois, and Hawaii, and various federal
courts, including the Supreme Court of the United States.
I am one of the counsel for plaintiffs in the actions
captioned Blum's of San Francisco, et al. v. California and
Hawaiian Sugar Company, et al, Civil Action No. 0117 GHB,
and Harold Freund Baking Co. v. California and Hawaiian
Sugar Company, et al, Civil Action No. C 74 2190 GHB, and am
Plaintiffs' Coordinating Counsel in these consolidated
proceedings.

2. I have read the Motion to Disqualify and
Memorandum of Points and Authorities in Support of Motion to
Disqualify the Honorable George H. Boldt, and the accompanying
affidavits of counsel attached thereto, and submit this
Affidavit in opposition to such Motion.

1 3. At the meetings of plaintiffs' attorneys
2 preceding the July 8, 1975 initial pretrial conference in
3 these actions, plaintiffs' counsel elected a nineteen member
4 Steering Committee to supervise conduct of these proceedings,
5 and designated William H. Ferguson, Esq. to act as Chairman
6 of Plaintiffs' Steering Committee and myself to act as
7 Plaintiffs' Coordinating Counsel.

8 4. At the July 8, 1975 pretrial conference, Mr.
9 Ferguson introduced himself to the Court as "ad hoc chairman
10 of the plaintiffs' steering committee" (See Transcript of
11 Proceedings at page 4), and functioned as such pending
12 formalization of plaintiffs' organization in Pretrial Order
13 No. 1 (dated July 24, 1975).

14 5. At the conclusion of the July 8, 1975 pretrial
15 conference, the Court directed plaintiffs' and defendants'
16 counsel to jointly prepare Pretrial Order No. 1 memorializing
17 the Court's rulings at that hearing. Included within these
18 matters was the formal appointment of Plaintiffs' and
19 Defendants' Steering Committees and Coordinating Counsel.
20 After extensive negotiations between counsel, Pretrial Order
21 No. 1 was finalized for submission to Judge Boldt.

22 6. Since the Ninth Circuit Judicial Conference
23 was in progress at the Fairmont Hotel in San Francisco on
24 July 24, 1975, and both Judge Boldt and Mr. Ferguson were in
25 attendance at this conference, arrangements were made with
26 Stephen V. Bomse, Esq., Defendants' Coordinating Counsel, to
27 present Pretrial Order No. 1 for approval by Judge Boldt at
28 Mr. Ferguson's room at the Fairmont Hotel.

29 7. Because of a previously arranged medical
30 appointment, I was uncertain of my time of arrival at the
31 Fairmont. Accordingly, the final form of Pretrial Order
32 No. 1 was delivered to Mr. Ferguson. This form of Order did

1 not include designation of Messrs. Ferguson and Bomse as
2 Chairmen of Plaintiffs' and Defendants' Steering Committees.

3 8. As a result of my medical appointment, I
4 arrived at this meeting after Pretrial Order No. 1 had been
5 signed by Judge Boldt, and was instructed that the word
6 "Chairman" should be inserted in Pretrial Order No. 1 after
7 Mr. Bomse's and Mr. Ferguson's names prior to filing with
8 the Clerk of the Court.

9 9. Subsequent to the meetings of plaintiffs'
10 counsel and the July 8, 1975 pretrial conference, it was my
11 understanding that Mr. Ferguson had been designated Chairman
12 of the Plaintiffs' Steering Committee.

13 10. Prior to the December 9-10, 1976 pretrial
14 conference in these actions, proposed settlements had been
15 reached by certain plaintiffs with defendants Holly Sugar
16 Corporation, Union Sugar Division of Consolidated Foods
17 Corporation, and California and Hawaiian Sugar Company,
18 although only the Holly settlement agreement had been finalized
19 in writing.

20 11. Plaintiffs' and settling defendants' counsel
21 had discussed among themselves procedures and schedules for
22 presentation of the proposed settlements to Judge Boldt. It
23 was finally determined that the agenda for the December 9-10
24 pretrial hearing include a joint request that the Court set
25 a schedule for consideration of these settlements. See
26 Plaintiffs' Request For Establishment of Schedule For Con-
27 sideration of Proposed Settlement (Filed December 5, 1975),
28 with attached copy of the Holly settlement agreement.

29 12. On December 3, 1976 I notified James F.
30 Kirkham, Esq., one of the Defendants' Coordinating Counsel,
31 that plaintiffs wished to add this matter to the previously
32 agreed upon agenda for the December 9-10 pretrial conference

1 as a sub-topic under the heading "Further Administrative
2 Matters as Necessary". The agenda, including plaintiffs'
3 and settling defendants' request for a schedule for consideration
4 of the settlements, was forwarded to Judge Boldt by Mr.
5 Kirkham on December 3, 1976. To my knowledge, no other
6 matter relating to the proposed settlements was scheduled
7 for consideration by Judge Boldt at any time prior to issuance
8 of the class certification order on May 20, 1976.

9 13. In anticipation of the December 9-10 pretrial
10 conference, plaintiffs and defendants forwarded to Judge Boldt
11 in Tacoma, Washington, certain documents relating to the matters
12 set for hearing, which documents, for plaintiffs, were being
13 prepared by counsel in San Francisco, Seattle and Chicago.
14 I was notified that some or all of these documents did not
15 reach Judge Boldt prior to the close of business on Friday,
16 December 5, 1975 because of weather conditions and an airline
17 strike affecting the Pacific Northwest, and was requested to
18 transmit replacement copies of plaintiffs' documents to
19 Judge Boldt at his San Francisco hotel upon his arrival.

20 14. On December 8, 1975, at 4:50 p.m., a messenger
21 service picked up a package from my office containing, among
22 other documents, a copy of the Request For Establishment,
23 etc. with attached Holly settlement agreement for delivery
24 to Judge Boldt at the Marine Memorial Union Club, 609 Sutter
25 Street, San Francisco.

26 15. On December 10, 1975, Judge Boldt stated on
27 the record of the Pretrial Conference that he received this
28 package on the morning of December 9, 1975, in the presence
29 of Robert D. Raven, Esq., one of the Defendants' Coordinating
30 Counsel.

31 16. The Affidavit of James F. Kirkham (dated
32 October 18, 1976) submitted in support of certain defendants'

1 Motion to Disqualify states at paragraph 6 that I was present
2 at an in-chambers conference which occurred on the morning
3 of December 9, 1975 before commencement of the pretrial con-
4 ference. This affiant denies that he attended such in-
5 chambers conference.

6 17. On December 22, 1975, at defendants' request,
7 I attended a conference with Judge Boldt in his chambers
8 in Tacoma, Washington. Messrs. Raven, Kirkham and Peter D.
9 Byrnes on behalf of defendants, and Messrs. Ferguson and
10 Albert R. Malanca, on behalf of plaintiffs, also attended.
11 At Mr. Raven's request, the conference was not recorded by
12 a court reporter.

13 18. At the December 22, 1975 conference, defendants'
14 counsel requested that Judge Boldt limit his participation
15 in these consolidated proceedings to consideration solely
16 of settlement matters pursuant to Rule 110 of the Local
17 Rules of Practice, United States District Court for the
18 Northern District of California. Judge Boldt denied defendants'
19 request, stating that the minimal knowledge he had received
20 would in no way effect a "veteran" judge like himself, or
21 influence his conduct.

22 19. At this conference, Judge Boldt restated that
23 he had not read the Holly Agreement, which had been received
24 for the first time in the presence of Mr. Raven on the
25 morning of December 9, 1975. Judge Boldt again assured
26 defendants that he would not in any way consider the proposed
27 settlements until after he had ruled on the pending class
28 motions.

29 20. In the course of this conference, after Judge
30 Boldt had denied defendants' request that he limit his
31 participation to settlement matters, Mr. Raven stated that
32 he did not have any doubt of Judge Boldt's ability to remain

1 neutral, and that Mr. Raven, as a lawyer, was comfortable
2 with the Court's decision as long as Judge Boldt felt comfortable.
3 Mr. Raven further stated that regardless of his views as a
4 lawyer, his client questioned the Court's ability to separate
5 the proposed partial settlement from the ongoing litigation.

6 21. At this conference, Judge Boldt stated that
7 he appreciated the difficulty of counsel approaching the
8 Court with a request for disqualification, and was in no way
9 offended by defendants' suggestion.

10 22. On December 22, Judge Boldt stated that he
11 would shortly be issuing an order instructing plaintiffs and
12 defendants to retain economists to report certain factual
13 analyses to the Court regarding the sugar industry. Judge
14 Boldt stated that for the first time in his career, he
15 believed that the record was insufficient without further
16 factual examination to either grant or deny the proposed
17 classes.

18 23. Subsequent to a pretrial conference on August
19 16-17, 1976, I negotiated with defendants' counsel regarding
20 Pretrial Order No. 12, which memorialized the Court's
21 August 17th rulings and approved the forms of Class Notice.
22 On August 20, 1976, Robert P. Mallory, Esq., one of defendants'
23 counsel, suggested inclusion of the following language in
24 the first paragraph of page 2 of the proposed form of order:

25 "The Court had not previously had an
26 opportunity to review such agreement."

27 24. Plaintiffs agreed to the insertion of this
28 language, which was included in the form of Pretrial Order
29 No. 12 submitted to Judge Boldt on Monday, August 23, 1976.

30 25. On Monday, August 23, 1976, Mr. Mallory
31 telephoned me and proposed that the language quoted above,
32 which had been suggested by defendants, be further modified.

1 I refused defendants' request to further change the proposed
2 pretrial order, and stated plaintiffs' position that defendants'
3 language did not reflect the record in these proceedings.
4 Mr. Mallory then telecopied defendants' suggestions to Judge
5 Boldt, and I replied in writing stating plaintiffs' objection.
6 (See letter of August 23, 1976 to The Honorable George H.
7 Boldt, attached hereto as Exhibit 1.)

8 26. On Monday, September 13, 1976, Mr. Raven
9 notified me that defendants intended to request a conference
10 with Judge Boldt in order to again ask that he disqualify
11 himself from these proceedings. In a conference call later
12 that day between Messrs. Raven and Kirkham, on behalf of
13 defendants, Messrs. Ferguson and Cooper, on behalf of
14 plaintiffs, and Mr. Andrew Gill, Judge Boldt's law clerk,
15 defendants requested an immediate appointment with Judge
16 Boldt, but refused to reveal to Mr. Gill that the purpose of
17 such appointment was to notify the Court that defendants intended
18 to request his recusal.

19 27. After checking Judge Boldt's calendar,
20 Mr. Gill informed counsel that Judge Boldt was unavailable
21 for a personal appointment prior to leaving for Boston two
22 days hence, but that Judge Boldt could speak with counsel by
23 conference telephone call before his departure. In the
24 alternative, Judge Boldt stated that he could schedule a
25 meeting with counsel in the near future in Boston where he
26 would be sitting. In reply, Mr. Raven said that defendants
27 did not want to discuss the unspecified purpose of their
28 request for an appointment (i.e., recusal) on the telephone.

29 //

30 //

31

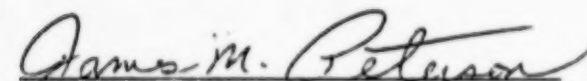
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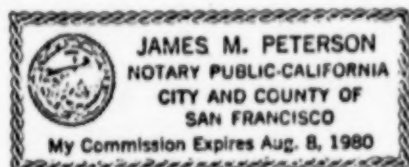
1 As a result, an appointment was scheduled for September 23,
2 1976 in Boston, in conjunction with a pretrial hearing on
3 other matters.

4 Further Affiant Sayeth Not.

5
6 
7 Josef D. Cooper

8 Subscribed and sworn to before me
9 this 15th day of November, 1976.

10
11 
12 NOTARY PUBLIC



August 23, 1976

The Honorable George H. Boldt
Senior United States District Judge
United States District Court
P. O. Box 1923
Tacoma, WA 98401

Re: Sugar Antitrust Litigation

Dear Judge Boldt:

We received today a copy of a letter dated August 23, 1976 to Your Honor from Robert Mallory, on behalf of all non-settling defendants. This letter commented on, among other things, proposed "Pretrial Order No. 12 Re: Form of Notice", which was lodged with Your Honor this morning together with a cover letter from Mr. Ferguson. Mr. Mallory's letter makes two comments with regard to the proposed form of Order which plaintiffs believe require some comment.

1. The last paragraph on page 1 of the letter (and continuing on to page 2) relates to paragraph VIII of proposed Pretrial Order No. 12. This paragraph provides that the Settlement Committee appointed to administer the proposed settlement shall immediately lodge any objections received to the proposed settlement with the Court, the Clerk's Office, and all parties to the proposed settlement. The non-settling defendants originally objected to plaintiffs' proposed form of notice to the Industrial-Union, etc. classes since it did not provide for the service of any such objections on a representative of the non-settling defendants. Plaintiffs opposed such a provision in the notice since we are of the view, as expressed to the Court, that the non-settling defendants have no interest in or standing to participate in matters relating to the proposed settlement. Plaintiffs did offer as a courtesy to provide non-settling defendants with a copy of any objections which might be filed. We understood Mr. Mallory to state on the record on August 17, that this

EXHIBIT 1

NOV 15 1976

COOPER & SCARPULLA.

The Honorable George H. Boldt
Re: Sugar Litigation

August 23, 1976
page 2

was acceptable to the defendants, and that they therefore had withdrawn their objection to the proposed form of notice. As Mr. Mallory admits (see letter at page 1, 3rd line from the bottom), the Court did not order plaintiffs to provide the non-settling defendants with a copy of any objections received, and accordingly we do not believe that the inclusion of our "gentlemen's agreement" in the order would be appropriate. Defendants have plaintiffs' commitment on the record to provide them with objections received as a courtesy. We can assure the Court that we intend to live up to that commitment.

2. The second matter mentioned in Mr. Mallory's letter relates to inclusion in the proposed Order of certain language contained in paragraph 2, on page 2, lines 11 and 12. As Mr. Mallory has stated, the language in question was suggested by the non-settling defendants and included in the Order at their request. The non-settling defendants first proposed that their language be entered in a telephone call this morning at approximately 10:30 a.m. After reviewing the original language and the proposed alteration submitted by the non-settling defendants, plaintiffs feel that they must object to such a change. This objection is based on the implication of the suggested modification that the Court had previously reviewed the original Holly settlement agreement, which we believe is contrary to the record. Accordingly, plaintiffs believe that the language of the proposed Order should remain as stated on lines 11 and 12 of page 2, or, in the alternative, suggest that the entire sentence be taken out of the Order. In such event, the record would speak for itself.

Thank you for your consideration of these additional comments.

Sincerely,

Josef D. Cooper

JDC/kp

cc: Wm. H. Ferguson, Esq.
Robert D. Rayon, Esq.
James P. Kistham, Esq.
Robert Mallory, Esq.

United States District Court for the
Northern District of California

IN RE SUGAR ANTITRUST LITIGATION

Master File

No. MDL 201

THIS DOCUMENT RELATES TO ALL ACTIONS

AFFIDAVIT OF HAROLD E. KOHN

COMMONWEALTH OF PENNSYLVANIA)
) ss.
COUNTY OF PHILADELPHIA)

HAROLD E. KOHN, being duly sworn according to law,
deposes and states:

I represent Plaintiffs in the above-captioned multidistrict litigation. I am a member of the Plaintiffs' Steering Committee and Executive Committee and I am Chairman of the Briefing Committee.

On the morning of July 8, 1975, immediately prior to the pretrial hearing in the above litigation, Mr. Ferguson and I informed Judge Boldt of the arrangements made among counsel for Plaintiffs and that William H. Ferguson, Esquire, would be the Chairman for Plaintiffs and Mr. Ferguson acted as such at the hearing.

On the morning of December 9, 1975, immediately prior to the pretrial hearing commencing that day, Judge Boldt met briefly with representatives of Counsel for Plaintiffs and Defendants in a room adjoining the courtroom.

It is my recollection that the meeting lasted for approximately 10 minutes or less.

Judge Boldt said that he had skimmed through a letter which he had received from Lee A. Freeman, Esquire, but had

1 not read it carefully in detail. Judge Boldt also stated
2 that he had been informed that a settlement had been arrived
3 at with one of the Defendants, but he had not read the
4 settlement agreement.

5 Mr. Raven complained that Mr. Freeman's letter and
6 notice of the settlement had prejudiced the judge so that
7 he could not decide the pending class motions. Judge Boldt
8 stated that the parties would have an opportunity at the
9 hearing to state their positions of record, and the record
10 of the hearing sets forth what was said.

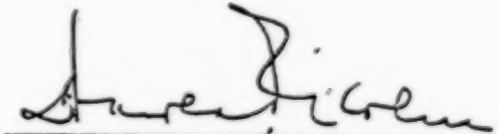
11 There was no extended argument with respect to the
12 classes during the meeting with the Court prior to the
13 commencement of the hearing, and my recollection is that I
14 stated simply that it would appear in due course that the
15 settlement was entirely proper in the light of the rele-
16 vant decisions.

17 On the morning of September 23, 1976, in the United
18 States Courthouse in Boston, Judge Boldt met again for
19 approximately the same length of time with representatives
20 of Counsel for Plaintiffs and Defendants prior to the
21 hearing with respect to the class notice lists.

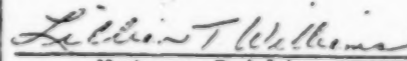
22 Mr. Raven told the Court that the non-settling
23 Defendants were considering the filing of a Motion to Dis-
24 qualify. Judge Boldt told Counsel that he was not per-
25 sonally offended by Defendants' suggestions, and said that
26 he presumed Defendants' Counsel were acting honorably as
27 attorneys.

28 Counsel for Defendants requested agreement that
29 participation in the argument would not constitute a waiver
30 of their right to do so. I replied that the Plaintiffs had
31 an interest in the subject of disqualification and that we
32 would not agree that participation in the argument would not

1 be a waiver. I also stated that as a matter of fact the
2 right to file a Motion to Disqualify had long since termi-
3 nated because Defendants had known whatever they were now
4 contending for more than a year. I also said that there
5 was no basis for the Motion in any event, because there is
6 no reason why a judge should not be informed of settle-
7 ments and, indeed, most judges participate in the settle-
8 ment proceedings without withdrawing from the litigation,
9 and that the continued threats of disqualification motions
10 were improper. I had with me a copy of the U. S. Code
11 provisions and the Annotations with respect to disquali-
12 fication and mentioned some of the holdings to Mr. Raven,
13 who replied that they would do their own research and had
14 thought the matter out very carefully.

15
16
17
18 
19 Harold E. Kohn

20
21 Subscribed and sworn to
22 before me this 13th day
23 of November, 1976.

24 
25 Notary Public
26 Philadelphia, Philadelphia Co.
27 My Commission Expires:

28 LILLIAN T. WILLIAMS
29 Notary Public, Philadelphia, Philadelphia Co.
30 My Commission Expires August 13, 1979
31
32

LEE A. FREEMAN
JERROLD E. SALZMAN
FREEMAN, ROTHE, FREEMAN & SALZMAN
One IBM Plaza, Suite 3200
Chicago, Illinois 60611
Telephone: (312) 467-6540

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

Master File No.
MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

MEMORANDUM OF STATES OF ILLINOIS AND INDIANA
IN OPPOSITION TO DEFENDANTS' MOTION
TO DISQUALIFY HONORABLE GEORGE H. BOLDT

I

PRELIMINARY STATEMENT

Certain defendants have filed a motion with the Court to disqualify Judge Boldt from further participation in these proceedings, challenging the impartiality of the Court and asserting personal bias and prejudice against them and in favor of plaintiffs. One of the principal incidents cited by these defendants is the abortive, proposed settlement reached by Holly Sugar Corporation (dated November 21, 1975), and the letter of November 26, 1976 sent to the Court by Lee A. Freeman, Sr. regarding this proposed settlement, which letter allegedly

influenced this Court's class action ruling. (See defendants' Memorandum Of Points And Authorities In Support Of Motion To Disqualify The Honorable George H. Boldt at pages 18-25.) Accordingly, the States of Illinois and Indiana are filing herewith their opposition to defendants' motion, so that the record in these proceedings will accurately reflect their belief that the Court's class action decision was based on the Court's view of the law and the facts, and was not the result of bias and prejudice.

II

THE STATES OF ILLINOIS AND INDIANA
DO NOT BELIEVE THAT THE COURT'S CLASS ACTION OPINION
WAS THE RESULT OF THE COURT'S PREJUDICE AND BIAS

The States of Illinois and Indiana oppose certain defendants' motion to disqualify Judge Boldt. Although the Opinion and Order Re Class Actions issued by this Court on May 20, 1976 severely limited their representative status by rejecting these plaintiffs' motion to certify them as representatives of (1) all consumer household units in their respective states, and (2) all unrepresented states and governmental bodies in the Chicago-West market, these plaintiffs are convinced that the Court's denial was based on its impartial view of the law, and not personal bias and prejudice.

Subsequent to the filing of plaintiffs' class motion and opening briefs, counsel for certain plaintiffs reached a proposed settlement with defendant Holly Sugar Corporation. The terms of the agreement provided for settlement of all claims by certain classes of sugar purchasers, including all governmental entities in the 23 state western markets, and all grocery stores having annual purchases in excess of \$150,000 (paragraph 3.B. and C.). The agreement also afforded Holly the right to withdraw from the proposed settlement upon

1 three contingencies, one of which was Court certification of
2 consumer classes as requested by these plaintiffs and others
3 (paragraph 12.A.).

4 Mr. Freeman, one of the counsel for the States of
5 Illinois and Indiana, had been informed of the terms of the
6 proposed Holly settlement during the course of its negotiation.
7 Since the question of class certification had not been decided
8 by the Court, Mr. Freeman wrote his November 26 letter stating
9 that settlement negotiations should be suspended prior to
10 class determination since it might prejudice the Court's
11 consideration.

12 At the December 9-10, 1976 pretrial hearing, Judge
13 Boldt said the following regarding this letter and the procedure
14 it would follow in making its class ruling:

15 I think, then, this does bring us to
16 the last matter we had in mind. It appears
17 there may be a possible impropriety in my
18 receiving the documents concerning the
19 Holly transaction. Fortunately, as Mr.
20 Raven knows from first hand, I got those
21 documents yesterday morning and had no
22 time to read them excepting to scan the
23 title. They are still just the way I got
24 them, and I am not ever going to look at
25 them again until an appropriate time comes
26 when all agree that it would be proper.
27 So let that settle your mind about that.

28 Secondly, I have not the faintest idea,
29 nor have I ever had any idea, that any
30 settlement could be considered until after
31 the ruling of the Court on class action.
32 So if you were preparing to make argument
on that subject, I will listen, but under-
stand that that is my plan. I am going to
try to get that decision made at the
earliest practicable time, which should
not be very far distant.

* * *

THE COURT: Mr. Raven, I don't think
there is any possibility of being in any way
influenced because I haven't read it. You
tell me they have in this proposal classes
for settlement. I didn't know that before
because I haven't read the papers.

1 MR. RAVEN: I appreciate that, but I
2 also appreciate that they did tell you about
3 the Holly settlement. They told you about
4 the amount.

5 THE COURT: That is all.

6 MR. RAVEN: I don't know what else.

7 THE COURT: That is all.

* * *

8 THE COURT: Not at all. I welcome
9 anyone's full expression. If you consider
10 that I am chargeable with some impropriety,
11 I would not be offended at all. Now, if
12 I were convinced that it was an impropriety --

13 MR. RAVEN: As we see it, Your Honor,
14 you are not involved nor are we. You did
15 not make this problem, nor did we, and I
16 can't help -- I was chastised a little bit
17 yesterday by the plaintiffs' attorney for
18 saying something that I did not say. And I
19 think I am going to chastise them just a
20 little bit for doing something they should
21 not have done. But we are going to leave
22 it up to Your Honor from there on.

23 THE COURT: Very well.

* * *

24 MR. KIRKHAM: Your Honor, may I just
25 to clear the record, as we understand it
26 in any event, the letter addressed to you
27 by Mr. Freeman, which I know you will have
28 read out of courtesy to Mr. Freeman, it says --

29 THE COURT: This is somewhat analogous
30 to the business of ruling on the objections
31 to evidence in a non-jury case. You have to
32 read the exhibit to decide whether you should
read it.

MR. KIRKHAM: Certainly, of course,
Your Honor. And that does set out -- I was
concerned with your statement that, you know,
defendants may have in any way participated
in conveying any information to the Court.
We think it is the plaintiffs that have done
so, and it does on Page 2 of that letter set
out that the Holly -- I read, now,

"The Holly settlement provides for
establishment for purposes of four
classes . . ."

Spells them out,

". . . deliberately excluded are
consumers."

1 And I think in fairness to the record that
2 it is a letter, say, a six page letter.

3 THE COURT: I must have noticed that,
4 but frankly, I skimmed it so quickly I
5 couldn't be responsible for remembering
6 anything that was in it excepting that there
7 was a proposed settlement.

8 MR. KIRKHAM: Your Honor, our concern,
9 of course, is as is appropriate, goes to
10 appearances as well as facts. And certainly
11 that letter speaks for what it speaks for.
12 It is a six page letter, and I think in
13 fairness to this discussion, that it also
14 ought to be part of the record. And I do
15 have a copy here. It may be made a part of
16 the record.

17 THE COURT: Yes.

18 Transcript of Proceedings, Pretrial Confer-
19 ence of December 10, 1975, page 171, line
20 15 to page 172, line 6; page 182, lines
21 15-25; page 183, lines 9-21; page 184,
22 line 8 through page 185, line 17.

23 The States of Illinois and Indiana have no reason
24 to doubt the sincerity or veracity of the Court's remarks.
25 Nor have they any reason to doubt that the Court made its
26 class ruling in an impartial and unbiased manner based on
27 the law as the Court understands it.* In fact, the Court's
28 May 20 Class Action Opinion differs in two significant
29 respects from the ruling allegedly "dictated" by the Holly
30 settlement agreement. First, the Court refused to certify
31 market-wide classes of all governmental entities in 23
32 states, notwithstanding that such governmental classes were

* Defendants have also tried to impute impropriety to
the discussion held in chambers prior to the pretrial confer-
ence on December 9, 1975, during which certain plaintiffs'
counsel allegedly aired their views regarding certification
of consumer classes. No counsel for the States of Illinois
or Indiana were present at that conference, and have no
knowledge of what actually transpired at that time. How-
ever, these plaintiffs doubt that any impropriety could have
occurred at such time since defense counsel were present in
chambers and had the opportunity to join in the alleged
exchange. In any event, these plaintiffs do not question
that the Court gave full and fair consideration to all class
questions, without any predisposition or prejudice.

1 specified by the terms of the agreement. Secondly, the
2 Court certified grocery store classes comprised of all
3 groceries in the market areas, rejecting the \$150,000 annual
4 business volume limitation suggested by plaintiffs.

5 Although the States of Illinois and Indiana continue
6 to believe that certification of consumer classes would have
7 been appropriate in these actions, they do not contend that
8 the Court's decision was based on anything but its view of
9 the law and the facts and the valid exercise of its discretion.

10 III

11 CONCLUSION

12 For the above stated reasons, the States of Illinois
13 and Indiana oppose certain defendants' motion to disqualify
14 Judge Boldt.

15 DATED:

16 Respectfully submitted,

17 LEE A. FREEMAN
18 FREEMAN, ROTHE, FREEMAN & SALZMAN

19 WILLIAM J. SCOTT
20 ATTORNEY GENERAL FOR THE
21 STATE OF ILLINOIS

22 JOHN P. MEYER
23 JERROLD E. SALZMAN
24 SPECIAL ASSISTANT ATTORNEYS
25 GENERAL FOR THE STATE OF ILLINOIS

26 THEODORE L. SENDAK
27 ATTORNEY GENERAL FOR THE
28 STATE OF INDIANA

29 By

30 

31 Lee A. Freeman

IN RE: SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

TO

THE HONORABLE GEORGE H. BOLDT

The policy of Judge Boldt, permitting the full advocacy of any and all reasonable issues in this case, compared with Defendants' apparent desire to stall the proceedings by abusive procedural techniques, stands as a refutation of their trumped up allegations.

In that case, United States v. Ritter, 540 F.2d 459 (10th Cir. 1976), the United States Court of Appeals held that Judge Ritter should be recused from presiding over a criminal antitrust proceeding because the "totality" of the facts evidenced a reasonable likelihood that the litigation would not receive the impartial treatment "that litigants have a right to expect in the United States District Court." supra at 464. That is to say, 28 U.S.C. §455(a) requirement of disqualification in any proceeding "in which (the Judge's) impartiality might reasonably be questioned" was found to exist. In that case, the United States Court of Appeals chose to disqualify Judge Ritter due to the cumulative effect of the fact that an attorney for the Defendant in a case pending before Judge Ritter had previously been President of the Utah State Bar and had been involved in the consideration and disposition of adverse resolutions introduced at the State Bar meeting against the Judge. The Utah State Bar, Board of Commissioners and Executive Committee, all of which the attorney in question was a member, voted not to recommend

that impeachment resolutions be introduced against the Judge nor to have the 10th Circuit's Judicial Council certify his disability pursuant to 28 U.S.C. §372. The attorney in question delivered the resolution to the Judge after the Committee's disposition of the matter. Other factors evidently weighing heavily in the Court of Appeal's decision were the rather caustic and overbearing attitude of the Judge toward the government's counsel and the fact that a criminal prosecution was pending in that case. (At p. 464).

It is readily apparent that the present situation is in no way analogous to the aforementioned case. Judge Boldt has himself stated that his relationship with Mr. Ferguson was limited to rather infrequent social engagements with Mr. Ferguson and his wife and the Judge's wife in their joint attendance at sporting events. Moreover, even in this regard, the Judge pointed out that opposing counsel were invited to attend if the said engagement occurred during litigation that was presently pending before the Court involving Mr. Ferguson. (pp. 47-48 of Defendants' Exhibit "C").

It should be stated that Defendants have not raised any allegations as to any caustic or berating behavior practiced by Judge Boldt. A reading of Defendants' Exhibit "C", will show beyond doubt that, even with respect to the actual proceeding where counsels argued the allegations of impartiality, the utmost respect and judicious consideration were accorded all parties by Judge Boldt. Attention should be focused at Appendix I following the Ritter decision at p. 465. Therein is provided various colloquies between Judge Ritter and the government. At one point when counsel for the government remarked that " . . . we are extremely concerned that it (allowing discovery of certain correspondence) will curtail the vigorous enforcement of the antitrust laws", Judge Ritter responded, " Well, isn't that too damn bad". (At p. 465). Other indicia of caustic behavior on the part of Judge Ritter can be

perused from the aforementioned Appendix. It is immediately apparent that this sort of behavior was not followed in the proceedings before Judge Boldt.

In essence, Defendants advance the unique proposition that federal judges should be recused when it is shown that they have a personal relationship with one of the party's counsel. This proposition is not only unsupportable by judicial authority, (see Broome v. Simon, 255 F.Supp. 434 (W.D.La. 1965); Firnhaber v. Sesentinger, 385 S.Supp 406 (E.D.Wis. 1974), but pragmatically could not be adopted. If such were the case, the federal judiciary would be non-existent. Plaintiffs assert that if the loose construction desired by Defendants is given to the statute in question, the congressional intent of the legislation will be misplaced. Absent clear and convincing proof that established a definite prejudice or bias on the part of the Judge or the existence of the appearance of impartiality Defendant cannot be permitted to utilize this judicial machinery to pick the judge of his choice.

Previous to the enactment of 28 U.S.C. §455, the federal courts had held that, " . . . a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." Laird v. Tatum, 409 U.S. P24, 833 (1972). §455 alters the vantage point from which the problem should be viewed. As the Senate Judiciary Committee said in its recommendations which later became the law:

"While the proposed litigation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the NEW test should not be used by judges to avoid sitting on difficult or controversial cases. At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a reasonable fear that a judge will not be impartial.

Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." (S. Rep. No. 93-419, 93rd Cong., 1st Sess., 1973, p. 5, quoted in 13 Wright, Miller and Cooper, supra, at 371-372.)

The Defendants want more than a right to be heard. They want a right to win. That is not seeking impartiality. Using \$455 here to achieve their goal is improper. See Bumpers v. Uniroyal Tire Co., 385 F.Supp. 711 (D.C.Pa. 1974).

The present statute certainly was not intended to be totally defense oriented. Because a Plaintiff must proceed to trial at the earliest possible time, rarely will such a procedure be utilized by him, due to the inevitable delay that would insue therefrom. And, although Plaintiffs do not question the viability of the present statute and certainly endorse its utilization under proper circumstances, Plaintiffs submit that once again Defendants' purpose is to stall the present proceedings and intimidate all parties involved by attempting to exclude federal judges until they secure one that would be favorable to their point of view. Again, such a move is totally abusive of the judicial machinery and Plaintiffs respectfully move that Defendants' Motion to Disqualify be overruled.

Respectfully submitted,

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BY: _____

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing upon all counsel on the attached service lists by depositing copies of the same in the United States mail, postage prepaid, on this the _____ day of November, 1976, along with two (2) copies to the Honorable George H. Boldt, United States District Judge, P. O. Box 1993, Tacoma, Washington, 98401.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION) Master File No.
)
) MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

PLAINTIFFS' MOTION FOR LEAVE TO FILE

AFFIDAVIT OF ALBERT R. MALANCA, ESQ.

IN OPPOSITION TO MOTION TO

DISQUALIFY THE HONORABLE GEORGE H. BOLDT

Plaintiffs respectfully request leave to file the
Affidavit of Albert R. Malanca, Esq. attached hereto as
Exhibit 1, as Exhibit D to Plaintiffs' Memorandum of Points
and Authorities in Opposition to Motion to Disqualify the
Honorable George H. Boldt, for the following reasons:

1. Mr. Malanca is counsel of record in the
action Washington Beverages, Inc., et al. v. Utah-Idaho Sugar
Company, et al., C75-1130-GHB, and as such, has participated
in these consolidated proceedings.

1 2. Mr. Malanca was present at the December 22,
2 1975 meeting in chambers held in Tacoma, Washington, at
3 which time certain defendants' representatives requested
4 Judge Boldt to restrict himself to presiding over only the
5 settlement aspects of this litigation.

6 3. During the period of time in which plaintiffs
7 were preparing their memorandum and accompanying affidavits
8 in opposition to certain defendants' motion to disqualify
9 Judge Boldt, Mr. Malanca was out of town on business and was
10 not available for preparation of an affidavit.

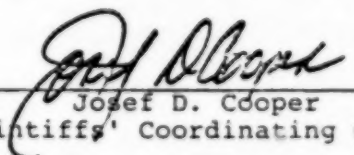
11 DATED: November 23, 1976

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 IN RE SUGAR ANTITRUST LITIGATION)
12)

13 THIS DOCUMENT RELATES TO: MASTER FILE
14 ALL ACTIONS) NO. MDL-201
15)

16 AFFIDAVIT OF ALBERT R. MALANCA

17 STATE OF WASHINGTON)
18 County of Pierce) ss.

19 I, ALBERT R. MALANCA, being first duly sworn, deposes and
20 says:

21 1. I am a member of the State Bar of Washington and attorney
22 of record for Washington Beverage Co., Valley Packers, Inc., and
23 Kelley Parquhar, Inc., plaintiffs in the Sugar Antitrust Litiga-
24 tion. I am also a member of plaintiffs' Steering Committee in
25 these proceedings. I submit this affidavit in opposition to
26 defendants' motion to disqualify the Honorable George H. Boldt.

27 2. On December 22, 1975, at the request of defendants'
28 counsel, a meeting was had in the chambers of Judge Boldt in
29 Tacoma, Washington. Defendants were represented at the meeting
30 by Robert Raven, James Kirkham and Peter Byrnes. Plaintiffs'
31 attorneys, William Ferguson and Joseph Cooper, as well as myself,
32 attended the meeting.

Page One - affidavit of Albert R. Malanca
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EXHIBIT 1

1 3. Mr. Raven suggested that defendants wanted no record of
2 the meeting, so no reporter was present. Mr. Raven then stated
3 that certain defendants believed the Holly settlement made it
4 difficult for Judge Boldt to give independent consideration to
5 class action questions then before him.

6 4. Judge Boldt stated he knew none of the details of the
7 settlement and had not read nor would he read any settlement
8 agreement. Judge Boldt said that he wanted nothing done by the
9 parties regarding any settlement until after he ruled on issues
10 pertaining to the class action, and stated that he would need
11 additional expert information from both sides before he could
12 rule on the class action issues, and would shortly enter an order
13 requesting this information.

14 5. Mr. Raven suggested that Judge Boldt should limit him-
15 self to acting as a settlement judge in accordance with a local
16 rule of court in California, and that another judge should handle
17 all other matters respecting the litigation. Judge Boldt indicated
18 he was not inclined to divide his functions after he had taken
19 on the responsibilities assigned to him by the Judicial Panel in
20 multidistrict litigation.

21 6. Contrary to the implications suggested by the affidavit
22 of Robert D. Raven filed in support of defendants' motion, Judge
23 Boldt did not indicate that the terms and conditions of any settle-
24 ment had been disclosed to him. Further, contrary to the implica-
25 tion that Judge Boldt took defendants' proposal formally under
26 advisement and would rule on the matter at a later time (see
27 affidavit of Robert D. Raven, paragraph 14), Judge Boldt clearly
28 denied this request by defendants. Judge Boldt did assure all
29 present that he would not be influenced in any respect by any
30 tentative settlement by some defendant or defendants.

31 Page Two - affidavit of
32 Albert S. Malanca

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1 7. Judge Boldt throughout the meeting encouraged the
2 defendants to present their position directly since they seemed
3 somewhat reluctant; and that he would in no way be offended by
4 this. In my opinion, the court's sincere assurance to defendants
5 caused Mr. Raven to assure the court, and all persons present,
6 that he was fully satisfied with the court's fairness and impar-
7 tiality. Mr. Kirkham's actions indicated complete agreement with
8 Mr. Raven on this point.

9 8. In reviewing the affidavit of William Ferguson in support
10 of plaintiff's motion, he failed to mention at the first pre-trial
11 conference in San Francisco Judge Boldt announced (after a few
12 introductory remarks) that he wanted to meet briefly with the
13 plaintiff's counsel separately and with the defendants' counsel
14 separately. The court did then in fact meet separately and briefly
15 with counsel for both plaintiffs and defendants.

16
17 Albert S. Malanca
18 ALBERT S. MALANCA

19 SUBSCRIBED AND SWORN to before me this 23 day of
20 November, 1976.

21 Evelyn D. Erskine
22 Notary Public in and for the State
23 of Washington, residing at Tacoma.
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Page Three - affidavit of
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CERTIFICATE OF MAILING (C.C.F. 1013a)(2015.5)

The undersigned, at San Francisco, Calif., certifies to be true, under penalty of perjury, that he/she is a citizen of the United States over 18 years of age and is not a party to the within action. Business address is 320 Montgomery St., San Francisco, Calif. 94104. He/she executed this certificate and served a true copy of the foregoing document by mail placing same in an envelope, sealing, fully prepaying postage thereon, and depositing said envelope in U. S. Mail at San Francisco, California on the 23 day of Nov 19 76. said envelope was addressed as follows:

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 IN RE SUGAR ANTITRUST LITIGATION) Master File No.
11)
12) MDL 201

13 THIS DOCUMENT RELATES TO:

14 ALL ACTIONS)
15)

16 SUPPLEMENTAL SIGNATURES TO PLAINTIFFS' REPLY TO
17 MOTION TO DISQUALIFY THE HONORABLE GEORGE H. BOLDT

18 Plaintiffs' herewith lodge with the Court additional
19 signatures of plaintiffs' counsel adopting plaintiffs' Reply to
20 Motion to Disqualify The Honorable George H. Boldt (dated
21 November 16, 1976), which signatures were previously unavailable
22 for submission to the Court.

23 DATED: November 24, 1976

24 Respectfully submitted,

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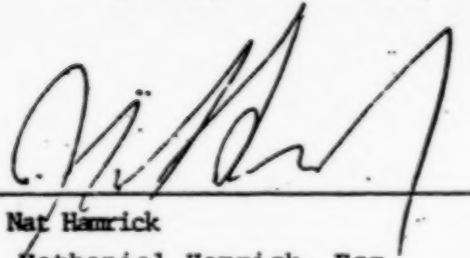
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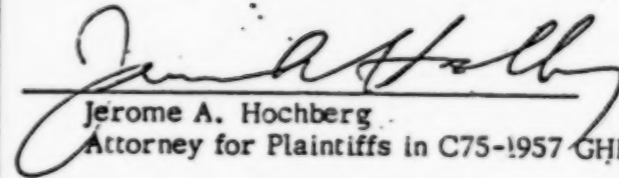
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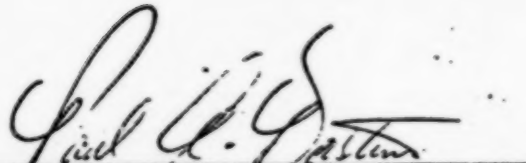
Signature Page To Plaintiffs' Reply To Motion To
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Attorney for Plaintiffs in C75-1957 GHB

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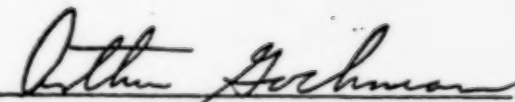
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Signature Page To Plaintiffs' Reply To Motion To
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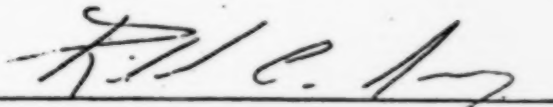
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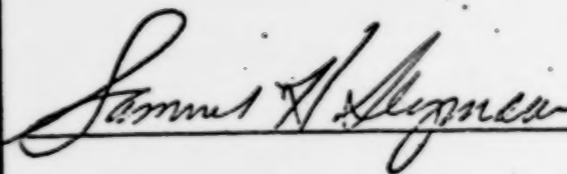


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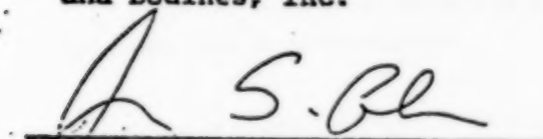


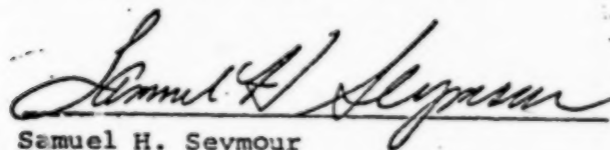
THE BROTHERS RESTAURANTS INC. v.
AMALGAMATED SUGAR CO. INC. C75-1606 GHB

STEAK-O-RAMA INC. v.
AMALGAMATED SUGAR CO. INC. C75-1674 GHB

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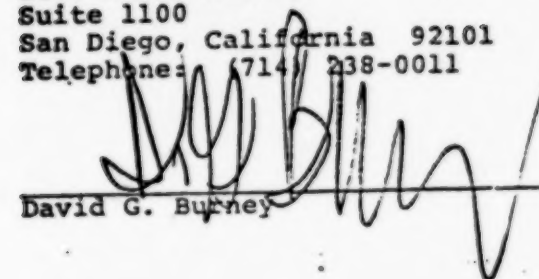

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION) Master File No.
)
) MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

SUPPLEMENTAL SIGNATURE OF PLAINTIFF STATE OF COLORADO

TO PLAINTIFFS' REPLY TO MOTION TO DISQUALIFY

THE HONORABLE GEORGE H. BOLDT

Plaintiff State of Colorado herewith lodges with the Court
the additional signature of counsel for plaintiff State of Colorado
adopting plaintiffs' Reply to Motion to Disqualify the Honorable George
H. Boldt (dated November 16, 1976).

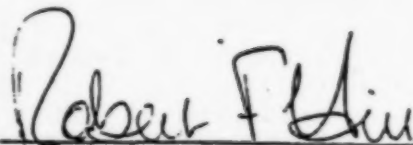
DATED: December 3, 1976

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within
SUPPLEMENTAL SIGNATURE OF PLAINTIFF STATE OF COLORADO TO
PLAINTIFFS' REPLY TO MOTION TO DISQUALIFY THE HONORABLE
GEORGE H. BOLDT upon all counsel on the attached service
lists by depositing copies of same in the United States
maile postage prepaid, at Denver, Colorado, this 3^d day
of December, 1976. I have also served two copies upon
the Honorable George H. Boldt, United States District
Judge, P.O. Box 1993, Tacoma, Washington 98401



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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10 IN RE SUGAR ANTITRUST LITIGATION)
11)

Master File
No. MDL-201

12 THIS DOCUMENT RELATES TO:)
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14 ALL ACTIONS)
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15 REPLY MEMORANDUM OF DEFENDANTS
16 IN SUPPORT OF MOTION TO DISQUALIFY
17 THE HONORABLE GEORGE H. BOLDT
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1 TABLE OF CONTENTS
2
3

	<u>Page</u>
Table of Authorities.....	(iii)
Introduction.....	1
I. THE FACTS ALLEGED ARE LEGALLY SUFFICIENT TO SUPPORT DEFENDANTS' MOTION BOTH UNDER SECTION 455(a) AND UNDER SECTION 144 OF THE JUDICIAL CODE.....	4
A. <u>Ex parte</u> Communications Between Mr. Ferguson and the Court and Related Matters.....	5
1. The Court and Mr. Ferguson did in fact have an <u>ex parte</u> conver- sation involving the merits of consolidation of the <u>1812</u> case.....	5
2. Defendants' factual allegations with respect to Mr. Ferguson's motives for favoring consolida- tion of the <u>1812</u> case are not contested by plaintiffs.....	7
3. The Court held an <u>ex parte</u> con- ference with Mr. Ferguson on August 18, 1975 in which future scheduling of events was dis- cussed.	8
4. Selection of Mr. Ferguson as Chairman of Plaintiffs' Steering Committee and the Fairmont Hotel Incident.....	10
5. Messrs. Ferguson and Kohn, in their Affidavits, have actually disclosed yet another <u>ex parte</u> conversation of which defendants were previously unaware.....	12
6. Mr. Ferguson spoke <u>ex parte</u> with the Court concerning the Holly settlement in November, 1975.....	13

Page

B. Misrepresentations by the Court.....	16
1. Knowledge of the contents of the Holly settlement.....	16
2. The Holly settlement document was not filed under seal.....	20
II. PLAINTIFFS HAVE IGNORED THE LIBERALIZED STANDARD FOR DISQUALIFICATION UNDER 28 U.S.C. § 455(a), ON WHICH THIS MOTION IS PRIMARILY PREMISED.....	21
A. Defendants' Motion is Timely.....	27
B. Defendants' Supporting Affidavits Are Sufficient.....	29
C. Plaintiffs' Remaining Case Author- ity Fails to Support Their Contentions..	31
CONCLUSION	33

TABLE OF AUTHORITIES

Page(s)

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Anchor Grain Co. v. Smith, 297 F. 204 (5th Cir. 1924).....	31
Berger v. United States, 255 U.S. 22 (1921).....	4
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Willenbring v. United States, 306 F.2d 944 (9th Cir. 1962).....	31, 32

CODES, STATUTES AND RULES

Code of Judicial Ethics	
Canon 3A(4).....	3, 6, 13, 34
28 U.S.C., § 144.....	2-4, 7, 21, 22, 24-27, 29-32
28 U.S.C., § 455.....	3, 23, 26, 27, 29

Page(s)

28 U.S.C., § 455(a).....	1,2,4,7,16, 21-32
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Federal Rules of Civil Procedure, Rule 33.....	31
Rules of United States District Court, Northern District of California, Rule 110.....	16,19
<u>OTHER AUTHORITIES</u>	
S. Rep. No. 93-419, 93 Cong., 1st Sess. (1973).....	22,23
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United States District Court
Northern District of California

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

MASTER FILE
No. MDL-201

REPLY MEMORANDUM OF
DEFENDANTS IN SUPPORT OF
MOTION TO DISQUALIFY THE
HONORABLE GEORGE H. BOLDT

This Memorandum is filed in response to Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Disqualify the Honorable George H. Boldt ("Pl. Mem."), filed on November 15, 1976. As demonstrated below, plaintiffs have failed to establish either that defendants' factual showing is legally insufficient to support the motion to disqualify, or that the motion should fail upon any other ground. Indeed, plaintiffs do not dispute in any significant respect the record made by defendants, and have provided further examples of impropriety in their attempt to explain the Court's conduct and their own.

Plaintiffs' Memorandum is remarkable for its cavalier treatment of the facts established by defendants, and for its failure to respond to the crucial issue posed under 28 U.S.C. § 455(a) -- whether, upon the facts alleged by defendants, taken as true, Judge Boldt's impartiality might reasonably be questioned. In the face of defendants' showing that the Court participated in a series of ex parte communications with the

Chairman of Plaintiffs' Steering Committee on matters of substance in the litigation (which facts are generally confirmed in plaintiffs' own affidavits) and that the Court, though aware of the contents of the Holly settlement, later denied any such knowledge, plaintiffs respond by arguing at length that the motion should fail for alleged technical defects under 28 U.S.C. § 144. In so doing, plaintiffs ignore the gravity of defendants' charges and disingenuously focus upon the narrowest of the statutory sections under which this motion is brought.

As discussed at greater length below (pp. 21-26), the principal statutory provision under which this motion must be considered is amended Section 455(a). That statute establishes a single criterion for disqualification: has the conduct of Judge Boldt been such that his "impartiality might reasonably be questioned"? Is there on the present record an appearance of a lack of impartiality? Defendants' showing more than adequately satisfies this statutory criterion and, we submit, establishes as well that the Court is personally biased and prejudiced in favor of plaintiffs, thus satisfying the requirements of 28 U.S.C. § 144.

^{1/} Defendants do not suggest that their affidavits of bias and prejudice are deficient in any respect or that this motion is otherwise insufficient under 28 U.S.C. § 144. Rather, we seek to point out that plaintiffs, in limiting their substantive response to Section 144, have failed to address the principal issue before this Court.

Rather than confront squarely defendants' charges, plaintiffs repeatedly accuse defendants of bringing this motion as part of a "scheme to intimidate this Court and counsel." (See, e.g., Pl. Reply 3; Pl. Mem. 12) This charge is baseless, and can only be viewed as an attempt to divert attention from the substance of defendants' motion. To exercise a statutory right to question the Court's impartiality on the basis of a factual record replete with evidence of judicial impropriety -- including a series of ex parte communications in flagrant violation of Canon 3A(4) of the Code of Judicial Conduct -- can scarcely be dismissed as a "scheme to intimidate."

As required under 28 U.S.C. § 144, each attorney whose client filed an affidavit of bias and prejudice has certified under oath that his client's affidavit, and thus the motion itself, is brought in good faith. This motion was filed only after lengthy and thoughtful consideration by counsel and by their clients. None of the attorneys who signed this motion -- and their individual length of service at the bar extends to as much as 24 years -- has ever filed such a motion before, in this or in any other court.

Defendants are fully warranted, moreover, in filing this motion to require the Court to account for conduct which manifestly requires disqualification under Sections 455 and 144 of the Judicial Code. Defendants seek only to vindicate their constitutionally and statutorily guaranteed right to a court which is both free of actual bias and prejudice, and free of any appearance of partiality.

I. THE FACTS ALLEGED ARE LEGALLY SUFFICIENT TO SUPPORT DEFENDANTS' MOTION BOTH UNDER SECTION 455(a) AND UNDER SECTION 144 OF THE JUDICIAL CODE.

As noted in defendants' original Memorandum of Points and Authorities, filed on October 18, 1976 ("Def. Mem.") (p. 46), the Court is required to take as true the facts alleged by the moving party in support of this motion, and to decide whether those facts give "fair support" to the charges made. As the Supreme Court stated in Berger v. United States, 255 U.S. 22, 36 (1921):

"[T]he reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed."

Plaintiffs, apparently agreeing with this view of the law, have filed three affidavits setting forth their version of certain of the alleged factual incidents, "not to contest the truth of the allegations of Defendants," but allegedly to eliminate any possible implication that "Plaintiffs have agreed to or acquiesce in" defendants' statement of those facts. (Pl. Mem. 1.) More importantly, plaintiffs have not denied defendants' factual allegations in their most relevant particulars. Rather, they have attempted to obfuscate or explain these facts away, or to justify on one basis or another their conduct and the Court's. Even if plaintiffs' attempted factual rebuttal were to be weighed against defendants' charges -- which is

neither necessary nor appropriate in the present context -- defendants' allegations would remain substantially uncontested.

A. Ex parte Communications Between Mr. Ferguson and the Court and Related Matters.

The facts upon which defendants' motion are based, which facts survive even plaintiffs' efforts to respond on a factual basis, are set forth below.

1. The Court and Mr. Ferguson did in fact have an ex parte conversation involving the merits of consolidation of the 1812 case.

Mr. Ferguson concedes in his Affidavit (p. 3) that on July 7, 1975, he informed Messrs. Raven and Byrnes that a few days prior thereto, he had had an ex parte conversation with Judge Boldt "in which he [Judge Boldt] advised me, without any inquiry on my part, that his tentative thinking was that to keep the 1812 case in Tacoma and run it on a separate track would be inconsistent with the letter and spirit of Section 1407."

Neither the circumstances surrounding this grossly improper conversation nor its full substance are disclosed by Mr. Ferguson in his Affidavit. This ex parte communication is particularly disturbing in light of the fact that one of the defendants in the 1812 case, Amstar Corporation, had vigorously opposed consolidation of the Northwest cases (including the 1812 case) before the Judicial Panel, and Amstar

1 would have welcomed the opportunity to brief or argue the issue
2 prior to the Court's ruling thereon from the bench on July 8,
3 ^{2/}1975.

4 This incident underscores the very problem inherent
5 in ex parte communications. Why was the conversation held?
6 Under what circumstances? How long did it last? What was
7 said? Why was Judge Boldt expressing to Mr. Ferguson his views
8 on consolidation in this manner? Did Mr. Ferguson express his
9 views on consolidation to Judge Boldt? Defendants do not know
10 the answer to any of these questions. They only know that --
11 no matter what the answer to these questions may be -- the
12 appearance of impartiality is lost under such circumstances.
13 The rationale of Canon 3A(4)'s prohibition of ex parte contacts
14 is that once they have occurred, no amount of subsequent
15 disclosure or denial by the participants can erase from the
16 excluded party's mind the appearance of impropriety, and the
17 conviction that that party is being treated unfairly by the
18 court.

19
20
21 ^{2/} Contrary to the allegation made by plaintiffs (Pl. Mem.
22 8), defendants had not been certain prior to reading Mr.
23 Ferguson's Affidavit that such an ex parte contact had in fact
24 taken place, or what had been said. Defendants merely knew
25 what Mr. Ferguson had previously stated to Mr. Raven and Mr.
26 Byrnes -- that "the Judge wants the 1812 case consolidated."
27 (Kirkham Aff. ¶ 5) Before reading Mr. Ferguson's Affidavit,
28 defendants had no way of knowing for certain how Mr. Ferguson
acquired that knowledge, whether by inference or otherwise.
(Def. Mem. 8). Mr. Ferguson's Affidavit now reveals that the
Judge's views with respect to consolidation were in fact imparted
to Mr. Ferguson in an improper ex parte conversation, and
supplies details with respect thereto previously unknown to
defendants.

1 The subsequent ex parte conversations between Mr.
2 Ferguson and the Court, described below, are, we believe,
3 justifiably viewed in light of the appalling disregard of
4 judicial propriety manifested by this ex parte conversation
5 concerning the 1812 case. The cumulative weight of these
6 communications presents a clear case for disqualification both
7 under the "appearance of impropriety" test of Section 455(a),
8 and under the "bias or prejudice" test of Section 144.

9
10 2. Defendants' factual allegations with
11 respect to Mr. Ferguson's motives for
favoring consolidation of the 1812
case are not contested by plaintiffs.

12 In his Affidavit, Mr. Ferguson does not deny that he
13 first told counsel for the defendants in 1812 that he opposed
14 consolidation since it would be "prejudicial to his clients'
15 interests" (Def. Mem. 6), and that he later confided to Mr.
16 Raven that he had decided to favor consolidation because "they
17 have made me an offer I can't refuse." (Def. Mem. 7)

18
19 Mr. Ferguson's change of view with respect to consoli-
20 dation of 1812 (which, as noted above, was the subject of an
21 ex parte conversation with the Court) and his subsequent lead-
22 ership role on Plaintiffs' Steering Committee can be understood
23 only by reference to some advantage plaintiffs foresaw in having
24 Mr. Ferguson involved in the consolidated proceedings, and the
25 personal advantage in consolidation which Mr. Ferguson saw in
26 the "offer" he couldn't refuse. The record supports defendants'
27 belief that counsel for the class action plaintiffs wished to
28

1 take advantage of Mr. Ferguson's personal relationship with
2 the Court, and the means for bringing about this result was
3 the "offer" Mr. Ferguson couldn't refuse.

4
5 Defendants do not argue, as plaintiffs erroneously state
6 (Pl. Mem. 2, 3, and 30), that friendship between a judge and
7 an attorney, in and of itself, is a basis for disqualification.
8 On the contrary, defendants have made clear from the outset
9 (Def. Mem. 4) that it is not the close personal relationship
10 between the Court and Mr. Ferguson upon which their motion is
11 premised, but rather the continuing abuse of that relationship
12 by the Court and Mr. Ferguson, which has created the appearance
13 of impropriety and has, defendants believe, in fact resulted
14 in bias and prejudice in favor of plaintiffs and against defen-
15 dants.

16 3. The Court held an ex parte conference
17 with Mr. Ferguson on August 18, 1975
18 in which future scheduling of events
19 was discussed.

20 Certain basic facts with respect to the ex parte
21 conference of August 18, 1975 are disclosed in Mr. Ferguson's
22 letter to Mr. Lawrence Keeshan (attached as Exhibit A to
23 Defendants' Memorandum). That letter makes clear that Mr.
24 Ferguson appeared ex parte before the Court and discussed with
25 the Court "the procedure from here on out, as far as it was
26 scheduled." The Court apparently concluded on this occasion
27 that "[a]ll schedules should be consolidated to fit this hearing
28

1 date [for the class action motions, then set for November 3,
2 1975] in the present program," and requested that Mr. Ferguson
3 convey that information to defendants, which the latter did
4 in his August 18, 1975 letter to Mr. Keeshan.

5 Even if Mr. Ferguson and Judge Boldt did not discuss
6 anything else at this conference, as Mr. Ferguson contends in
7 his Affidavit (p. 6), it was highly improper for this conference
8 to have taken place at all.^{3/} The establishment of any date
9 for the class action hearing necessarily had serious implications
10 for pretrial discovery and briefing of the class action issue.
11 All class action proceedings -- including receipt of answers
12 and objections to interrogatories, responses to the objections,
13 motions for further answers, a hearing upon objections, submis-
14 sion of supplemental answers, taking of depositions, and briefing
15 of the class action issues by all parties based upon this
16 discovery -- were to be tailored to meet the November 3 hearing
17 deadline. The timetable thus established at this ex parte
18 conference was grossly unrealistic and would have been vigorously
19

20
21 ^{3/} The lengthy discussion of this incident in Mr. Ferguson's
22 Affidavit (pp. 5-6) is apparently meant to suggest that defen-
23 dants somehow authorized him personally to present this order
24 to the Court. However, no such authorization was given by
25 counsel for any defendant, including Messrs. [redacted] and Keeshan
26 (Supplemental Kirkham Aff. ¶ 2; Supplemental [redacted] Aff. ¶ 3).
27 Even if (contrary to fact) defendants had authorized Mr. Ferguson
28 personally to present the order to the Court for signing, this
would not excuse the Court's and Mr. Ferguson's conduct in
establishing ex parte a schedule for future proceedings in the
litigation.

1 opposed had defendants been present. In fact, the hearing date
2 was later changed to December 9, 1975.

3 The August 18, 1975 ex parte conversation, on a matter
4 of considerable importance to defendants, should never have
5 taken place, and is part of a pattern of such communications
6 which, individually and cumulatively, demonstrate an appearance
7 of this Court's partiality, and manifest its actual bias and
8 prejudice in favor of plaintiffs' lead counsel and of plaintiffs
9 themselves.

10
11 4. Selection of Mr. Ferguson as Chairman of
12 Plaintiffs Steering Committee and the
13 Fairmont Hotel Incident

14 At pages 4-12 of their original memorandum, defendants
15 set forth the facts concerning Mr. Ferguson's appointment by
16 the Court as Chairmar of Plaintiffs' Steering Committee.
17 Plaintiffs in effect admit the substance of the facts as set
18 forth by defendants.

19 Defendants contend that Mr. Ferguson was appointed
20 permanent Chairman of Plaintiffs' Steering Committee by the
21 Court at a meeting in the Fairmont Hotel on July 24, 1975.
22 We believe, and we submit that the record shows, that at the
23 time Mr. Ferguson was designated as Chairman by the Court, the
24 plaintiffs had not yet finally selected a permanent Chairman
25 for their Steering Committee. At the July 8 hearing Mr. Ferguson
26 described himself as "ad hoc" chairman of Plaintiffs' Steering
27 Committee (Def. Mem. 9). In his affidavit he states that on
28

1 July 7, 1975, he was "elected Chairman of an ad hoc Steering
2 Committee consisting of 19 persons." Mr. Ferguson's affidavit
3 is silent as to when and how a final selection was made by
4 plaintiffs concerning a Chairman.

5 Likewise, the affidavits of Messrs. Kohn and Cooper
6 carefully skirt the question of Mr. Ferguson's final selection
7 as distinguished from his selection to act as "ad hoc" chairman
8 for purposes of the July 8, 1975 hearing. Mr. Cooper is careful
9 to point out that at the meeting of plaintiffs' counsel on July
10 7, 1975, Mr. Ferguson was designated "to act as Chairman of
11 Plaintiffs' Steering Committee" for the hearing (Cooper Aff.,
12 ¶ 3) (emphasis added). Mr. Kohn's affidavit is to the same
13 effect, stating that "Mr. Ferguson acted as such [Chairman]
14 at the hearing" (Kohn Aff., p. 1) (emphasis added). Further,
15 Mr. Cooper does not deny that, on July 24, 1975, he expressed
16 surprise to Mr. Bomse at Mr. Ferguson's designation by the Court
17 as Chairman of Plaintiffs' Steering Committee. (See Def. Mem.
18 11.)

19 The affidavits of Messrs. Ferguson, Kohn and Cooper
20 thus do not contradict the fact that Mr. Ferguson was designated
21 as permanent Chairman of Plaintiffs' Steering Committee by the
22 Court rather than by plaintiffs.

23 With respect to the ex parte contact between the Court
24 and Mr. Ferguson at the Fairmont, Mr. Ferguson's Affidavit raises
25 as many questions as it answers. Had Judge Boldt and Mr.
26
27
28

1 Ferguson been together before they "went to [Mr. Ferguson's]
2 room"? (Ferguson Aff. p. 4) If so, where and for how long?
3 What was discussed then and during the "one or two minutes"
4 before Mr. Bomse arrived at Mr. Ferguson's hotel room? Were
5 it not for the other clearly improper ex parte communications
6 described elsewhere in this memorandum, these questions would
7 perhaps not be asked. But, viewed in the light of these other
8 communications, the occurrence of this ex parte contact, no
9 matter how much it is played down by Mr. Ferguson, can only
10 fuel defendants' legitimate concern that they have been
11 prejudiced by this and other such contacts.

12 5. Messrs. Ferguson and Kohn, in their
13 Affidavits, have actually disclosed yet
14 another ex parte conversation of which
15 defendants were previously unaware.

16 Mr. Ferguson states (Aff., p. 3) that:

17 "Prior to the convening of the
18 pretrial conference on [July 8, 1975],
19 Mr. Harold Kohn and I asked the defen-
20 dants for their permission for the
21 two of us to have a private conversation
22 with Judge Boldt about plaintiffs'
23 organization. The defendants granted
24 this request. Mr. Kohn and I, in
25 chambers, informed Judge Boldt that
26 I had been elected chairman of an ad
27 hoc Steering Committee whose names
28 we gave him. . . ."

Mr. Kohn makes a similar disclosure in his Affidavit (p. 1).

Contrary to Mr. Ferguson's representation, defendants'
permission for this ex parte conference was never sought; nor

1 was it given. (See Supplemental Kirkham Affidavit, ¶ 1;
2 Supplemental Raven Affidavit, ¶ 2). Thus, the more deeply
3 defendants delve into these facts, the more apparent becomes
4 the Court's total disregard of the need to avoid the appearance
5 of partiality towards any party and his insensitivity to the
6 requirements of Canon 3A(4).

7 6. Mr. Ferguson spoke ex parte with the
8 Court concerning the Holly settlement
9 in November, 1975.

10 Mr. Ferguson acknowledges in his Affidavit (p. 7) that
11 he called the Court in November, 1975 to disclose the Holly
12 settlement. Mr. Ferguson states that the telephone call to
13 the Court was made at the request of Mr. Rayner Hamilton, counsel
14 for Holly, but he fails to explain why the call was made ex
15 parte and without even informing the non-settling defendants.
16 Conference calls are available for matters of this type, and
17 no reason is tendered by Mr. Ferguson for his failure to attempt
18 to arrange such a call in this instance, involving as it did
19 an issue of considerable sensitivity.^{4/}

20 Mr. Ferguson does not deny that, as Judge Boldt has
21 also disclosed (Fertilizer transcript, p. 45; Def. Mem., p.
22

23 ^{4/} The portions of the transcript in the Folding Carton
24 litigation, submitted by plaintiffs to the Court on November
25 15, 1976, emphasize this very point. There the settlement
26 discussions with the Court were not held ex parte. Nor is there
27 any suggestion that tentative classes had been formed for the
28 purposes of settlement or that there were any settlements
conditioned upon the Court taking a certain position on contested
matters.

16), he told the Judge in this conversation that "he wanted to do whatever might be appropriate to move forward to some action on those proposed settlements."^{5/} Indeed, Mr. Ferguson elaborates by stating that he "also informed the Court that we were negotiating with two other defendants and that [he] would take up with him [Judge Boldt] a proposal for presentation of these settlements at some time in the future after he returned to Tacoma." (Ferguson Aff., p. 7)

Once again defendants can only speculate as to what arrangements might have been made concerning the presentation of the settlements to the Court when Mr. Ferguson or the Court "returned to Tacoma." Defendants did learn, however, after the Pretrial Conference of December 9-10, 1975, that certain representatives of Plaintiffs' Steering Committee, including Mr. Ferguson, and counsel for the settling defendants had arranged to meet with Judge Boldt in Tacoma on December 5 to obtain the Court's "tentative approval" of the settlements.

^{5/} This, in itself, has become one of the most significant issues in this litigation. Some plaintiffs, as well as defendants, have complained that the rush toward settlement has prejudiced their clients. See "Freeman Letter", Ex. D. to Def. Mem.; Dec. 10, 1975 Hearing Tr. 191-94 and May 24, 1976 Hearing Tr. 70-71 (comments of Mr. Freeman); and May 24, 1976 Hearing Tr. 69-70 (comments of Richard Light, Deputy Attorney General of the State of California). And defendants have argued that the Court approved plaintiffs' form of notice, including notice of the settlements, without a proper record being made. (Hearing of August 16 and 17, 1976, e.g., Tr. at 172-77, 179-84.) Thus, Mr. Ferguson's call to the Court concerning the Holly settlement raises, at the very least, an appearance that Judge Boldt was influenced by the information which Mr. Ferguson admittedly conveyed.

(Raven Aff., p. 4) This conference was apparently cancelled when counsel for one of the plaintiffs raised questions concerning the propriety of such a meeting with the Court. Id. Defendants to this date do not know how the meeting with the Court was arranged or what might have been communicated to the Court concerning the purpose of the meeting.^{6/}

The entire tenor of this episode, and Mr. Ferguson's description of it, confirm the impression, provided by the earlier ex parte contacts described above, that Mr. Ferguson and the Court felt free to communicate with respect to the case almost as though the opposing parties were not represented by counsel. Such conduct gravely undermines the confidence of litigants and the public in the impartiality of the judiciary, and constitutes the very type of conduct upon which Congress

^{6/} At a meeting in Tacoma on December 22, 1975, defense counsel were told by Messrs. Ferguson and Cooper that the Court had set aside time for such a conference. Messrs. Ferguson and Cooper do not deny that such a conference was "scheduled," but attempt to cloud the true facts by carefully worded affidavits (Ferguson Aff., p. 8; Cooper Aff., para. 12). For example, Mr. Ferguson states "There never was an 'in chambers conference' scheduled without the presence of the non-settling defendants. To my knowledge, neither Judge Boldt nor I ever agreed to attend any conference from which the non-settling defendants were to be excluded. There were discussions of various methods of processing settlements, primarily among some of the attorneys for the plaintiffs." (Ferguson Aff., p. 8) (emphasis added). The Affidavit is silent as to what was said to Judge Boldt with respect to the conference and what, if anything, Judge Boldt said in response -- whether there were conferences scheduled other than "in chambers," or whether conversations occurred which involved something less than formal "agreement" between Judge Boldt and Mr. Ferguson. Such affidavits can only intensify the reasonable apprehensions of defendants, and compound the appearance of impropriety.

1 contemplated that a motion under Section 455(a) might be
2 grounded.^{7/}

3
4 B. Misrepresentations by the Court

5 1. Knowledge of the contents of
6 the Holly settlement

7 Plaintiffs have either obfuscated or misconstrued
8 defendants' contentions with respect to the Court's knowledge
9 of the Holly settlement. So that the record will be completely
10 clear, these contentions may be restated as follows. As a result
11 of his reading of the Freeman letter (see Def. Mem. 19-24),
12 Judge Boldt was fully apprised of the pertinent contents^{8/} of
13 the Holly settlement as of December 10, 1975. That the Court
14 had read and understood the contents of the Freeman letter is
15 clear from his comments at the in-chambers conference on December
16 9, 1975 (Raven Affidavit ¶ 5-9; Kirkham Affidavit ¶ 6-7), and
17 his later statements on the record (December 10, 1975 Hearing,
18 Tr. 184-85). Notwithstanding this fact, the Court subsequently
19 denied on several occasions that he had any knowledge whatsoever
20 of the contents of this or the other two settlements. (Def.
21 Mem. 25-31.)

22
23 ^{7/} It should be noted that the type of communication involved
24 here was improper for two reasons. First, it took place ex
25 parte. Second, it involved a discussion of settlement in
26 violation of Rule 110 of the Rules of the Northern District
27 of California (see pp. 19-20, below).

28 ^{8/} The pertinent contents are those which made the viability
of the settlements depend upon Judge Boldt's certification of
industrial and grocery classes and denial of consumer classes.

1 Plaintiffs purport to understand defendants' argument
2
3 to rest upon the contention that Judge Boldt actually read the
4 Holly settlement agreement filed on December 5, 1975. (See,
5 e.g., Pl. Mem. 2, 7-10, 13.) Defendants' point is, however,
6 that Judge Boldt learned of the contents of the settlement from
7 the Freeman letter and from the subsequent colloquy of counsel.
8 Whether he also in fact read the Holly agreement itself is
9 irrelevant.

10 Plaintiffs' Memorandum totally ignores the Court's
11 receipt of the Freeman letter, which the Court admitted that
12 he had read at least sufficiently to understand its gist. As
13 the Court stated on the transcript in the Fertilizer hearings:
14

15 "I happen to know Lee Freeman quite
16 well, and his forceful style in
17 presenting his contentions I am not
18 unacquainted with. I glanced through
19 his letter just enough to see that
20 he was much incensed about the matter."
21 (Hearing of September 9, 1976, Tr.
22 46).

23 And when it was pointed out to him on the record in the December
24 9, 1975 hearing that the Freeman letter disclosed certain key
25 terms of the Holly settlement, the Court conceded "I must have
26 noticed that (Tr. 185). Defendants, moreover, have indicated
27 in their affidavits that it was clear from the colloquy which
28 took place in chambers before the December 9 hearing that the
Court was apprised of the significant aspects of the Holly

9/
1 settlement. (Raven Aff. ¶¶ 6-9; Kirkham Aff. ¶¶ 6-7.) These
2 facts are totally ignored by plaintiffs, who flatly state,
3 contrary to fact, that "the Court was unaware of any of the
4 specific provisions of the settlement until counsel for the
5 defendants chose to inform him of certain provisions during
6 argument." (Pl. Mem. 8)

7
8 Plaintiffs are attempting here to avoid the consequences
9 of their own misconduct in bringing to the Court's attention
10 the Holly settlement while the class certification motions were
11 still pending. Not only was the matter disclosed to the Court
12 in the Freeman letter, but the Holly agreement itself was filed
13 with the Court by Mr. Ferguson himself. 10/ Indeed, the entire
14 purpose of the filing by Mr. Ferguson of the Holly settlement
15 and the accompanying proposed schedule for consideration of
16 that settlement, which Mr. Ferguson argued at length to the
17 Court on December 10, 1975 (Tr. 172-77), was to have the Court
18 process the settlements contemporaneously with consideration

19
20 9/ Even Messrs. Ferguson and Kohn acknowledge in their
21 affidavits that the Judge admitted in chambers that he had
22 "scanned" or "skimmed through" the Freeman letter. (Ferguson
23 Aff., p. 9; Kohn Aff., p. 1).

24 10/ Curiously, Mr. Ferguson now denies knowledge of the filing
25 of the Holly settlement (Ferguson Affidavit, p. 9), though the
26 document of transmittal was signed in his name, apparently by
27 Mr. Cooper. (See Attachment A hereto.) Moreover, Mr. Ferguson
28 implicitly recognized that the Holly settlement had been lodged
with the Court when he argued at length, on December 10, 1975,
for a schedule of consideration of settlements to commence on
December 19, 1975, noting that December 19 was a date "by which
we hope to lodge with the Court the settlement agreements with
the two other defendants." (Dec. 10, 1975 hearing, Tr. 174)
(emphasis added) The Holly settlement, of course, had already
been filed, as Mr. Ferguson knew at the time, and as he must
now also know.

1 of the class action motions, which even the Court acknowledged
2 would have been grossly improper. (See p. 20, below; Manual
3 for Complex Litigation (West Ed. 1973), § 1.46).

4
5 Plaintiffs argue that "defendants have not indicated
6 any authority which would support a restriction on communications
7 with respect to a settlement to a Judge before whom litigation
8 is pending." (Pl. Mem. 6) Defendants are surprised at the
9 need to call to plaintiffs' attention Rule 110 of the Rules
10 of the U.S. District Court for the Northern District of
11 California, pursuant to which (under Pretrial Order No. 1) this
12 litigation is being conducted. Rule 110 provides:

13 "At any time after an action is
14 at issue all of the parties may file
15 with the clerk of the assigned judge
16 a joint request for a court settlement
17 conference at a time to be fixed by
18 the clerk. Unless the parties expressly
19 request the assigned judge to
20 participate, in the conference and waive
21 any claim of his disqualification to
22 try the case thereafter, the court
23 settlement conference shall, if the
24 request is granted, be conducted by
25 any available judge who consents to
26 participate. To facilitate the
27 conference, the parties shall present
28 to the participating judge at the
conference separate or joint informal
memoranda briefly explaining the nature
of the action and the factors pertinent
to settlement negotiations."

1
2 If plaintiffs desired to bring the Holly settlement
3 (or any other settlement) before the Court, they should have
4 done so pursuant to Rule 110, which would have given each party
5 the right to have the matter placed before a judge other than
6 Judge Boldt. Moreover, consideration of the settlements by

1 another judge would, in the present case, have avoided one of
2 the principal problems of which defendants now complain, namely
3 that the Court was influenced in its disposition of the class
4 certification motions by knowledge of the terms of the
5 settlements.

6
7 Finally, if the plaintiffs need further authority as
8 to the impropriety of bringing the Holly settlement before the
9 Court, it may be found in Judge Boldt's own statement on the
10 transcript of the December 10, 1975 hearing, quoted in
11 Plaintiffs' Memorandum at p. 8, in which the Judge expressly
12 recognized the impropriety of inquiring into, receiving, or
13 accepting any information on the subject of the proposed
14 settlements while the class certification motions were pending. 11/

15 2. The Holly settlement document was
16 not filed under seal.

17 Plaintiffs attempt to explain away, but do not deny,
18

19 11/ The Court stated:

20 "I repeat now, again, what I have said
21 two or three times previously, that
22 as far as I am concerned I shall not
23 inquire into, receive, or accept any
24 information on the subject of these
25 proposed settlements. I will make
26 no ruling concerning the matter in
27 any way whatever at least until such
28 time as all counsel seek one or at
least are available to participate
in the matter before the ruling is
made. This is just Horn Book every
day procedure, especially for one who
has been a trial judge for many years
... ." (Dec. 10, 1975 Hearing, Tr.
198).

1 the fact that the Holly settlement document was not filed under
2 seal, as the Court stated on the transcript of the Fertilizer
3 hearings (see Def. Memo. 28-30), but rather was filed as a
4 document of public record. Plaintiffs would have one believe
5 that the term "under seal," which is a term of art, especially
6 in this litigation where there are specific procedures
7 established for filing documents under seal, was used carelessly
8 by Judge Boldt, a veteran of over twenty years on the bench.
9 Defendants cannot accept this rationalization offered by
10 plaintiffs.

11 * * *
12
13 In summary, the facts presented by defendants
14 are substantially uncontested by plaintiffs and constitute a
15 basis more than adequate in law upon which to require
16 disqualification under 28 U.S.C. §§ 455(a), 144, and 455(b)(1).
17 Once a clear showing of the appearance of lack of impartiality,
18 such as that described above and in defendants' earlier
19 memorandum, has been made by a party, this appearance can only
20 be removed by granting the motion to disqualify.

21 II. PLAINTIFFS HAVE IGNORED THE LIBERALIZED
22 STANDARD FOR DISQUALIFICATION UNDER 28 U.S.C.
23 § 455(a), ON WHICH THIS MOTION IS PRIMARILY
24 PREMISED.

25 As noted in the introduction to this memorandum,
26 plaintiffs have likewise failed to address the crucial legal
27
28

1 issue posed in this motion -- whether, upon the facts alleged
2 by defendants, taken as true, Judge Boldt's impartiality might
3 reasonably be questioned under 28 U.S.C. § 455(a). Rather,
4 plaintiffs respond as though § 455(a) had never been enacted,
5 or as though each of the substantive and procedural limitations
6 embodied in § 144 and the case law developed thereunder should
7 be engrafted upon § 455(a).

8
9 Plaintiffs pose the key issue of statutory construction
10 as follows:

11 "The question that arises is
12 whether the test for removal of a Judge
13 pursuant to §455 is different, in any
14 respect, from the test required under
15 28 U.S.C. §144 providing for the removal
16 of a Judge because of bias and
17 prejudice." (Pl. Mem. 17)

18 Plaintiffs' answer, strangely, is in the negative, suggesting
19 that the passage of amended § 455(a) was a meaningless act by
20 the Congress, and that judges should continue to consider motions
21 to disqualify only under § 144, which Congress had patently
22 found inadequate to protect the integrity of the federal judicial
23 process.

24 Plaintiffs' erroneous reading of § 455(a) is inconsistent
25 with the legislative history, the language of the section, and
26 numerous authorities and commentators. (See Def. Mem. 35-47.)
27 The policy which the amendment to § 455(a) was designed to
28 effectuate is set forth explicitly in the legislative history:

1 "Subsection (a) of the amended section
2 455 contains the general, or catch-
3 all, provision that a judge shall
4 disqualify himself in any proceeding
5 in which 'his impartiality might
6 reasonably be questioned.' This sets
7 up an objective standard, rather than
8 the subjective standard set forth in
9 the existing statute This
10 general standard is designed to promote
11 public confidence in the impartiality
12 of the judicial process by saying,
13 in effect, if there is a reasonable
14 factual basis for doubting the judge's
15 impartiality, he should disqualify
16 himself and let another judge preside
17 over the case. . . ." S. Rep. No.
18 93-419, 93rd Cong., 1st Sess. 5 (1973)
19 (emphasis added).

20
21 As discussed in detail in Defendants' Memorandum
22 (pp. 35 et seq.), Congress evinced a clear intention to alter
23 substantially the criteria and standards for disqualification
24 in making the amendments to § 455 which became effective in
25 December, 1974. As suggested by the legislative history and
26 recognized by the commentators, Section 455(a) "makes a drastic
27 change in practice in the federal courts." 13 Wright, Miller
28 & Cooper, Federal Practice and Procedure § 3549, at 369 (1975).
This commentator goes on to point out that:

21 "Because of this general provision
22 of Section 455(a), an overly-nice
23 reading is not required of the specific
24 instances of disqualification spelled
25 out in Section 455(b). Thus if a
26 judge's first cousin is party to a
27 case, there is no disqualification
28 under Section 455(b)(5) since a cousin
is not within the third degree of
relationship. But if the judge has
a close personal relation with the
cousin, reasonable men might well
question his impartiality and his

disqualification would be required under Section 455(a). [Citing other examples.] There are many other instances in which the general provision of Section 455(a) will be applicable in order to preserve the appearance of impartial justice." (Id., pp. 370-71.)

The authorities are in accord. The Tenth Circuit Court of Appeals pointed out in United States v. Ritter, 540 F.2d 459, 462 (10th Cir. 1976), the most recent authority interpreting section 455(a), that

"... Congress enacted the revision to make the statute conform to the Code of Judicial Conduct, 119 Cong. Rec. 33029 (1973) (remarks of Senator Burdick) as well as to 'broaden and clarify the grounds for disqualification,' 119 Cong. Rec. 33029 (1973), and to substitute an objective test of reasonableness for the subjective test of the former section 455." (emphasis added).

Likewise, as the court correctly noted in a case cited by plaintiffs, Samuel v. University of Pittsburgh, 395 F. Supp. 1275, 1277 (W.D. Pa. 1975), rev'd on other grounds, 538 F.2d 391 (3rd Cir. 1976), Section 455(a) does not grant "automatic veto power" over a judge; however, as that court also recognized, "amended § 455 changes the original Section 455 by liberalizing the disqualification procedure to favor the moving party. . . ."

The sole basis for plaintiffs' incorrect assertions that the standards of § 455(a) are the same as those of § 144 is an overly broad application of the holding in Davis v. Board

of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1975). Davis held that, when deciding whether § 455(a) covers the court's prejudice against an attorney, as opposed to a party, the old cases decided under § 144 may be followed to limit the coverage of § 455(a) to parties. Even this narrow holding of Davis was rejected in United States v. Ritter, supra, which held that, in applying § 455(a), it is relevant to consider actions which favor or disfavor an attorney as well as those which affect the party directly, since "if a judge is biased in favor of an attorney, his impartiality must reasonably be questioned in relationship to the party." 540 F.2d at 462.^{12/}

In any event, to the extent that Davis can be construed to support plaintiffs' incorrect reading of § 455(a), that decision is erroneous. The Ritter decision, supra, correctly notes that, contrary to the conclusion drawn by plaintiffs, Sections 144 and 455(a) are not "identical," and that "Section 455(a) is broader [T]he language of Section 455(a) allows a greater flexibility in determining whether disqualification is warranted in particular situations [than does § 144]." 540 F.2d at 462. And it should be noted that even the limited superimposition of the judicial gloss

^{12/} Plaintiffs attempt to distinguish Ritter on the grounds (1) that it was a criminal case, and (2) that it involved a judge who had been criticized in other cases. Section 455(a), however, does not suggest that civil litigants are any less entitled to a tribunal free of the appearance of lack of impartiality than litigants in criminal cases. The second attempted ground of distinction is clearly irrelevant.

1 of § 144 upon § 455(a) in the Davis case has been justly
2 criticized as contrary to legislative intent in the only other
3 authority which has commented on Davis to date, "Disqualification
4 of Federal Judges for Bias Under 28 U.S.C. Section 144 and
5 Revised Section 455," 45 Fordham L. Rev. 139, 155 (Fall 1976),
6 in which it was expressly noted that:

7 "To the extent Davis is followed in
8 other circuits, the policy the amendment
9 was intended to promote will be frus-
10 trated."

11 To repeat, the basic question before the Court is whether
12 there is a reasonable basis for doubting the Court's
13 impartiality. If so, "he should disqualify himself and let
14 another judge preside over the case."^{13/} Plaintiffs' Memorandum
15 consistently ignores this question and assumes that the legal
16 standards applicable under 28 U.S.C. § 455 as amended are
17 identical to those established under 28 U.S.C. § 144. This
18 erroneous legal premise leads plaintiffs both (1) to cite
19 authorities construing § 144 (or the pre-1975 version of § 455)
20 as controlling with respect to motions under the present §
21 455(a); and (2) to superimpose the procedural requisites of
22 § 144 upon § 455(a), to which they are irrelevant.

23
24 ^{13/} Again, defendants stress that they do not concede in any
25 way that the requisites of § 144 have not themselves been more
26 than adequately met. Rather, it is noted that this motion is
27 premised primarily upon the more general standard of § 455(a)
28 which, standing alone, clearly compels disqualification.

1 A. Defendants' Motion is Timely.

2
3 Characteristic of plaintiffs' treatment of Sections
4 455(a) and 144 is their treatment of the "timeliness" or "waiver"
5 issue. Plaintiffs allege that defendants have "waived" their
6 right to disqualification, claiming that the motion is not
7 timely. Defendants' initial memorandum anticipated and answered
8 plaintiffs' objections. (Def. Mem. 44-45) Defendants' motion
9 is based upon a cumulative series of events, climaxed by the
10 Court's actions in late August and early September, 1976.
11 Defendants' motion promptly followed.

12 In support of their "waiver" argument, plaintiffs rely
13 upon a number of cases in which, unlike the present case, the
14 motion was not predicated upon such a cumulative series of
15 events. Plaintiffs acknowledge that disqualification can be
16 grounded upon a cumulative record of incidents. (Pl. Mem. 36-
17 37) Thus, plaintiffs cite Duplan v. Deering Milliken, Inc.,
18 400 F. Supp. 497 (D.S.C. 1975), for the proposition that once
19 "triggered," such motions must be made with reasonable diligence.
20 Defendants agree -- and maintain that they have so acted.

21 Typically, however, plaintiffs have superimposed the
22 requirements of Section 144 upon Section 455(a).^{14/} Section
23

24
25 ^{14/} In Duplan, Judge Hemphill explicitly noted that because
26 of a "grandfather clause," amended § 455(a) did not apply to
27 his case -- and thus confined his decision to a ruling based
28 upon Section 144 and pre-amendment §455. 400 F. Supp. at 505.
Hence, even Duplan, by its own holding, would not be controlling
insofar as this motion is grounded upon current § 455(a).

1 455(a) is silent regarding procedural mechanisms for its
2 invocation; it may be raised upon motion and enforced as any
3 other procedural right. There is no express "timeliness"
4 requirement. This is particularly significant where, as here,
5 a series of prior events takes on particular import when a
6 subsequent event compels that they be seen in a new light.

7 Defendants have not lightly submitted this motion.
8 (See Def. Mem. 32 et seq.) Rather than having sought -- as
9 plaintiffs repeatedly and abusively allege -- to "intimidate"
10 this Court or any litigants before it, defendants have moved
11 with caution and with proper regard for the dignity of Judge
12 Boldt's judicial office. It has been with the greatest of
13 reluctance, and the greatest of care, that they have evaluated
14 and chosen the course of action they have now taken. It is
15 this respect for the judiciary, and the painstaking care with
16 which the defendants have checked and cross-checked the facts
17 alleged in the motion and accompanying affidavits, which
18 plaintiffs would now deem the basis of "waiver."

19 Defendants have previously described how in early
20 September, 1976, the concerns which prompted this motion
21 crystallized. (Def. Mem. 3, 28-32) Plaintiffs attempt to make
22 much of defendants' refusal to make their disqualification motion
23 in a conference telephone call with the law clerk of this Court.
24 (Pl. Mem. 33) Clearly, it was not unreasonable for defendants
25 to have preferred, as a matter of professional courtesy to Judge
26 Boldt, to present such a serious question to the Court in person,
27 either in Tacoma as originally requested, or in Boston to meet
28

1 the Court's convenience.

2 Mr. Kohn apparently also wishes this Court to forget
3 the explicit agreement, reached in chambers in Boston on
4 September 23, 1976, that proceeding with the hearing on class
5 notice issues on that date would not be deemed a waiver of
6 defendants' right to seek disqualification thereafter. Defen-
7 dants clearly stated to the Court and counsel for plaintiffs
8 before the hearing that, absent such agreement, they could not
9 proceed with the hearing then scheduled. Rather than abort
10 the transcontinental travel of numerous counsel, defendants
11 understood that such a reasonable agreement had been achieved
12 and are confident that the Court also so understood it. (Sup-
13 plemental Kirkham Aff. ¶3; Supplemental Raven Aff. ¶ 6).

14 Plaintiffs seek to impose upon this litigation a
15 "timeliness" concept which fails either to take regard of the
16 "good cause" provision of Section 144 (see, e.g., Duplan, supra,
17 at 509-10) or of the complexity of the case and geographic
18 dispersion of parties and counsel. The timeliness issue is
19 a red herring, not statutorily mandated under § 455 and not
20 sufficient to defeat the motion under § 144.

21
22 B. Defendants' Supporting Affidavits Are Sufficient.

23 A second respect in which the plaintiffs attempt to
24 have this motion decided under a crabbed reading of § 144, rather
25 than the more liberal standard of § 455(a), is their argument
26 that the affidavits submitted are not affidavits of "parties"
27 as required by § 144.
28

1 First, and most significantly, it should be noted that
2 there is no requirement under Section 455(a) that the affidavits
3 submitted be affidavits of a "party." Indeed, there is no
4 requirement that any affidavit whatsoever be submitted in support
5 of such a motion. Thus, plaintiffs' argument is, on the face
6 of the statute, irrelevant to § 455(a).

7 Even under § 144, however, plaintiffs' argument is narrow
8 and pedantic, and is based upon the meager support of an ill-
9 considered 1924 decision which fails to reflect the realities
10 of modern corporate organization and modern legal practice.

11 In addition to the affidavits filed by certain outside
12 counsel representing certain of the parties in this litigation
13 (i.e., Messrs. Raven, Kirkham, and Fairman), affidavits of bias
14 and prejudice under 28 U.S.C. § 144 were submitted by four corpo-
15 rate defendants -- Amstar Corporation, The Amalgamated Sugar
16 Company, The Great Western Sugar Company, and U and I Incorporated.
17 These affidavits were executed by responsible corporate officials
18 of these corporations, whose authority to act on behalf of the
19 corporation in this regard cannot be denied.
20

21
22 15/ The affidavits were executed by (1) John C. Reynolds, Vice
23 President and General Counsel of Amstar Corporation; (2) John
24 R. Lemke, Legal Counsel of The Amalgamated Sugar Company; (3)
25 Peter J. Adolph, Vice President and General Counsel of The Great
26 Western Sugar Company; and (4) John M. Wunderli, Director of
27 Legal Affairs for U and I Incorporated.
28

1 Short of a corporate resolution -- which inherently
2 could not be an "affidavit" -- it is difficult to imagine how
3 a corporation may "speak" if not through its duly appointed
4 officers acting within their authority.^{16/} To the extent that
5 Anchor Grain Co. v. Smith, 297 F. 204 (5th Cir. 1924), suggests
6 the contrary, it should be treated as the anachronism that it
7 is, and rejected by the Court.

8 C. Plaintiffs' Remaining Case Authority
9 Fails to Support Their Contentions.

10 Plaintiffs have cited a melange of off-point Ninth
11 Circuit cases purportedly to establish that the law in this
12 Circuit requires denial of defendants' motion. Yet, with the
13 exception of Mavis v. Commercial Carriers, Inc., 408 F. Supp.
14 55 (C.D. Cal. 1975), in which Judge Hauk refused to disqualify
15 himself on the basis of an extremely remote financial
16 "connection" to a corporate party, the cited cases have not
17 been grounded on current Section 455(a). They thus offer no
18 support whatever to plaintiffs with regard to defendants' motion
19 under that provision of law.
20

21 Even under Section 144, with its "bias or prejudice"
22 standard, plaintiffs' cases are not applicable to the present
23 facts. In Willenbring v. United States, 306 F.2d 944 (9th Cir.
24

25 16/ Compare F.R.Civ. P. 33, which allows responses to
26 interrogatories addressed to a corporation to be filed by the
27 "officers or agents" of a corporation.
28

1 1962), a Section 144 motion was denied because the allegations
2 of ex parte contact between counsel and the court were not
3 accompanied by any suggestion of prejudice to the moving party
4 arising from such contact.

5 Similarly, in Botts v. United States, 413 F.2d
6 41 (9th Cir. 1969), the party affidavit did not in fact charge
7 actual bias or prejudice, only the possibility that the court
8 may have made some public comments -- which if made, may or
9 may not have been prejudicial or evidence of bias or prejudice.
10 In Grimes v. United States, 396 F.2d 331 (9th Cir. 1968), the
11 Ninth Circuit did no more than hold that conclusory statements
12 of "bias or prejudice" in a Section 144 affidavit are not
13 sufficient to require disqualification. And Hodgson v. Liquor
14 Salesmen's Local No. 2, 444 F.2d 1344 (2d Cir. 1971); is to
15 the same effect.

16
17 In short, the cases cited by plaintiffs to excuse ex
18 parte contacts between counsel and the Court fail to note (1)
19 that those decisions were made under a standard demanding
20 demonstrable "bias or prejudice" under Section 144, instead
21 of the broader "appearance of impropriety" standard appropriate
22 under § 455(a); and (2) that those cases themselves stand only
23 for the proposition that it is not ex parte contact per se which
24 demands disqualification. When ex parte contacts occur in the
25 context of a disputed matter, and can result in prejudice to
26 a party, they cannot be excused even under the strict application
27 of § 144, much less the "appearance of impropriety" standard
28 now mandated by Section 455(a).

1 CONCLUSION

2
3 Defendants are fully aware that it is a grave matter
4 to charge a Federal judge with having participated in ex parte
5 communications with counsel for another party, and with
6 misstating the record. Defendants are fully cognizant of the
7 seriousness of the particular charges made in support of this
8 motion. Yet defendants and their counsel are firmly convinced
9 that the charges made are fully documented in the record, and
10 constitute a basis for disqualification.

11 At the hearing in the Northwest Fertilizer cases, the
12 defendants' motion to disqualify Judge Boldt was based, in part,
13 upon this Court's relationship with Mr. Ferguson. In explaining
14 this relationship on the record the Court observed that his
15 relationship with Mr. Ferguson is "no closer a relationship
16 than I have with a great many other lawyers all over the
17 country." (Tr. of September 9, 1976 Hearing, p. 48) One fact,
18 however, emerges clearly from this record. Whatever the nature
19 of his relationship with Mr. Ferguson or other attorneys, the
20 Court has failed to keep the proper judicial distance from Mr.
21 Ferguson in the present case.

22
23 The Court's ex parte communications with Mr. Ferguson
24 have created an appearance of impropriety which no amount of
25 denial, disclaimer, and explanation by the Court or by Mr.
26 Ferguson can dispel. It is for this very reason, we submit,
27
28

1 that such ex parte contacts are strictly prohibited by the Code
2 of Judicial Conduct, Canon 3A(4) of which provides:

3 "A judge should accord to every
4 person who is legally interested in
5 a proceeding, or his lawyer, full right
6 to be heard according to law, and,
7 except as authorized by law, neither
8 initiate nor consider ex parte or other
9 communications concerning a pending
10 or impending proceeding."

11 Based upon the foregoing record, defendants and their
12 counsel remain convinced, and hereby affirm their conviction,
13 that the Court has manifested bias and prejudice against them
14 and in favor of plaintiffs, that the appearance of impartiality
15 has been irrevocably lost, and that defendants cannot hereafter
16 receive justice at the hands of this Court.

17 Dated: November 29, 1976

18 Respectfully submitted,

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(Appearances of counsel on
signature page)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

Master File No.

MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

REQUEST FOR ESTABLISHMENT OF SCHEDULE
FOR CONSIDERATION OF PROPOSED SETTLEMENTS

Plaintiffs' National Steering Committee (hereinafter
"Plaintiffs") has reached proposed settlements with three
defendants in these consolidated actions -- Holly Sugar
Corporation; Union Sugar Division, Consolidated Foods Corpora-
tion; and California and Hawaiian Sugar Company. The text
of the settlement agreement with Holly Sugar Corporation is
attached hereto as Exhibit A, and is herewith lodged with
the Court. Settlement agreements with Union Sugar Division,
Consolidated Foods Corporation and California and Hawaiian
Sugar Company are currently being drafted. Plaintiffs and
these settling defendants herewith request that the Court
establish a schedule for consideration and implementation of
these settlements. Plaintiffs and the settling defendants

1 suggest the following schedule for the Court's consideration:
2 December 19, 1975 - Lodge the settlement
3 agreements with Union Sugar
4 Division, Consolidated Foods
5 Corporation and California
6 and Hawaiian Sugar Company
7 with the Court.
8 January 9, 1976 - Plaintiffs and settling
9 defendants file proposed plan
10 of implementation of agreements
11 with the Court.
12 January 23, 1976 - Comments on proposed plan of
13 implementation filed by any
14 interested party.
15 February 6, 1976 - Reply to any comments filed
16 by plaintiffs and settling
17 defendants.
18
19 Hearing on proposed plan of
20 implementation on such date
21 as may be convenient to the
22 Court.
23
24 Plaintiffs and the settling defendants submit that establishment
25 of such a schedule would facilitate orderly consideration of
26 the proposed settlements.
27
28 Respectfully submitted,
29 Rayner H. Hamilton, Esq.
30 White & Case
31 14 Wall Street
32 New York, New York 10005
Counsel for Holly Sugar Corporation

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2 Heller, Ehrman, White & McAuliffe
3 44 Montgomery Street
4 San Francisco, California 94104
5
6 Counsel for Union Sugar
7 Division, Consolidated Foods
8 Corporation
9
10 Bailey M. Lang, Esq.
11 Brobeck, Phleger & Harrison
12 111 Sutter Street
13 San Francisco, California 94104
14
15 Counsel for California and
16 Hawaiian Sugar Company
17
18 William H. Ferguson, Esq.
19 Ferguson & Burdell
20 1700 Peoples National Bank Bldg.
21 Seattle, Washington 98171
22
23 By William H. Ferguson
24 William H. Ferguson,
25 Chairman, Plaintiffs' National
26 Steering Committee
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STIPULATION AND AGREEMENT
OF SETTLEMENT BETWEEN
CERTAIN PLAINTIFFS AND
HOLLY SUGAR CORPORATION
WHICH WAS EXHIBIT A HERETO,
IS OMITTED.

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United States District Court for the
Northern District of California

IN RE SUGAR ANTITRUST LITIGATION

Master File
No. MDL-201

THIS DOCUMENT RELATES TO ALL ACTIONS

SUPPLEMENTAL AFFIDAVIT OF JAMES F. KIRKHAM

JAMES F. KIRKHAM, being first duly sworn deposes

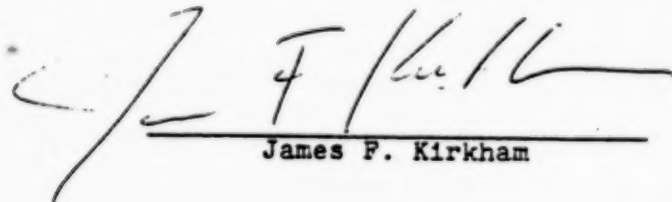
and says:

1. He gave no consent to any counsel for plain-
tiffs to meet with Judge Boldt on July 8, 1975; he did not
know in advance that such meeting would take place and to
the best of his knowledge, information and belief no consent
was given by counsel on behalf of defendants for such meeting.

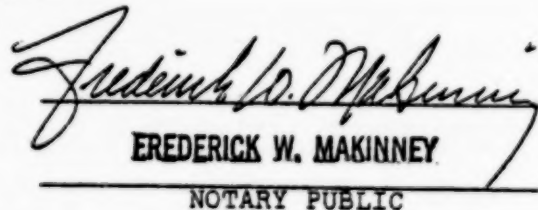
2. He gave no consent to Mr. Ferguson or any
counsel for plaintiff that Pretrial Order No. 2 be delivered
in person to Judge Boldt and did not know in advance that
this would occur. To the best of his knowledge, information
and belief no consent was given by any counsel for defen-
dants for such action, nor any advance notice given that
Mr. Ferguson would take such action, and in particular no
such consent was given nor knowledge had by Messrs. Bomse or
Keeshan of the Heller, Ehrman office.

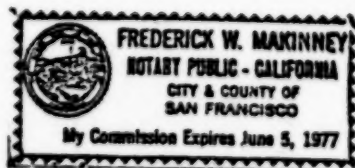
3. At the meeting in Boston between the Court
and coordinating counsel, the Court and all counsel expressly

1 agreed that defendants could proceed with the hearing sched-
2 uled in Boston without the fact of their participating in
3 that hearing constituting any waiver with respect to defen-
4 dants' motion to recuse.

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James F. Kirkham

11 Subscribed and Sworn to
12 before me this 24th day of
November, 1976.

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FREDERICK W. MAKINNEY
NOTARY PUBLIC



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

MASTER FILE
MDL-201

ALL ACTIONS

SUPPLEMENTAL AFFIDAVIT OF ROBERT D. RAVEN

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) ss.

I, ROBERT D. RAVEN, being first duly sworn, depose
and say:

1. I am a member of the State Bar of California and
one of the attorneys of record for Amstar Corporation, a
defendant herein. Since December 9, 1975, James F. Kirkham
and I have served as defendants' co-coordinating counsel in
these proceedings. I submit this supplemental affidavit in
support of the motion to disqualify The Honorable George H.
Boldt from further participation in this litigation. I have

1 read all of the papers filed on behalf of plaintiffs in reply
2 to this motion, including the affidavits of Messrs. Ferguson,
3 Cooper, and Kohn.

4 2. At page 3 of the Affidavit of Wm. H. Ferguson
5 dated November 11, 1976 and filed in this action, Mr. Ferguson
6 states: "Prior to the convening of the pretrial conference on
7 that date [presumably, July 8, 1975], Mr. Harold Kohn and I
8 asked the defendants for their permission for the two of us
9 to have a private conversation with Judge Boldt about the plain-
10 tiffs' organization. The defendants granted this request." I
11 was neither asked for any such consent nor did I give any such
12 consent, and I am unaware of any other defense counsel having
13 received or having granted any such request.

14 3. I gave no consent to Mr. Ferguson nor to any
15 other counsel for plaintiffs that Pretrial Order No. 2 be
16 delivered in person by Mr. Ferguson to Judge Boldt without
17 defense counsel being present and did not know in advance that
18 such an ex parte meeting between Mr. Ferguson and Judge Boldt
19 would occur. To the best of my knowledge, information and
20 belief, no consent for such action was given by any counsel
21 for defendants nor was any advance notice given that Mr.
22 Ferguson would take such action.

23 4. At pages 8 and 9 of the Affidavit of Wm. H.
24 Ferguson dated November 11, 1976 and filed in this action
25 Mr. Ferguson purports to describe certain events preceding the
26 December 9-10, 1975 Pretrial Conference, including the manner
27 in which the document entitled "Request for Establishment of
28 Schedule for Consideration of Proposed Settlements" and its
29 attached "Stipulation and Agreement of Settlement" were de-
30 livered to Judge Boldt prior to the December 9, 1975 hearing.

1 5. The facts concerning that matter are as follows:
2 On or about December 3, 1975 Mr. Kirkham and I, as co-
3 coordinating counsel for defendants, met with Mr. Cooper, as
4 coordinating counsel for plaintiffs, for the purpose of arrang-
5 ing a joint agenda for the Pretrial Conference scheduled for
6 December 9, 1975. Nothing was said in that conference about
7 any agenda item pertaining to settlements or proposed settle-
8 ments. I was absent from the city the next day. On returning
9 I discovered that Mr. Cooper had inserted in the proposed
10 agenda an item G-1 entitled "Schedule for Presentation of
11 Proposed Settlements to the Court." On December 5, 1975
12 Mr. Kirkham advised Mr. Cooper by letter that defendants in no
13 way acquiesced in inclusion of item G-1 in the agenda. A copy
14 of his letter of December 5, 1975 is attached. I had no
15 further information concerning the matter until Judge Boldt
16 advised co-coordinating counsel in chambers on December 9, 1975,
17 that, following his arrival in San Francisco late on December 8,
18 he had received the document entitled "Request for Establish-
19 ment of Schedule for Consideration of Proposed Settlements"
20 to which there was attached a copy of a "Stipulation and
21 Agreement of Settlement". Mr. Ferguson suggests at page 9 of
22 his Affidavit that I was present at a hotel when the documents
23 were allegedly delivered to Judge Boldt at such hotel. Mr.
24 Ferguson purports to draw that inference from the Court's
25 statement at page 171 of the transcript of the December 9, 1975
26 Pretrial Conference in which Judge Boldt stated: "It appears
27 there may be a possible impropriety in my receiving the docu-
28 ments concerning the Holly transaction. Fortunately, as Mr.
29 Raven knows from first hand, I got those documents yesterday
30 morning and had no time to read them excepting to scan the

1 title." I was puzzled when Judge Boldt made the above com-
2 ment but finally decided that he was referring to his des-
3 cription in chambers that morning of how he had come to receive
4 the documents. In any event, I had not seen Judge Boldt nor
5 had I spoken with him after his arrival in San Francisco until
6 the time of the in-chambers conference on the morning of
7 December 9, 1975, and I have no personal knowledge of how the
8 documents came into the possession of Judge Boldt. I know
9 only that he had them in hand at the in-chambers conference on
10 the morning of December 9, 1975.

11 6. Paragraph 26 of the Affidavit of Josef D. Cooper
12 dated November 15, 1976 and filed in this action is inaccurate
13 in that it states I notified Mr. Cooper "that defendants in-
14 tended to request a conference with Judge Boldt in order to
15 again ask that he disqualify himself from these proceedings."
16 In fact, I advised Mr. Cooper that the defendants would be
17 filing a motion for recusal and believed that as a courtesy to
18 Judge Boldt defendants should advise him in a face-to-face
19 meeting that such a motion would be filed. Mr. Cooper was
20 specifically advised that it would not be a long meeting
21 because we were not going to make any oral motion but merely
22 advise the Judge as a courtesy of the written motion that would
23 be filed. I authorized Mr. Cooper to advise Mr. Ferguson of
24 the purpose for such a conference and asked that neither he
25 nor Mr. Ferguson advise the Court because, again, as a courtesy,
26 the defendants wanted to do that in a face-to-face meeting
27 with the Court. However, during the conference call in which
28 Messrs. Ferguson and Cooper and Mr. Andrew Gill, Judge Boldt's
29 Law Clerk, Mr. Kirkham and I participated, Mr. Ferguson at-
30 tempted to have me reveal to Mr. Gill the purpose of the

1 conference. I declined for the reasons previously explained
2 to Mr. Cooper. When it developed that Judge Boldt was not
3 available for a conference in Tacoma, it was decided the
4 matter would be presented to him in Boston. At the meeting in
5 Boston between the Court and coordinating counsel, the Court
6 and all counsel agreed that the defendants could proceed with
7 the hearing scheduled without their appearance constituting
8 any waiver with respect to defendants' motion to recuse.

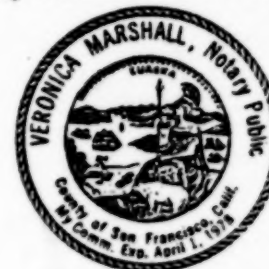
9 Dated: November 24, 1976.

10
11 Robert D. Raven
12

13 Subscribed and sworn to before me
14 this 24 day of November, 1976.

15 Veronica Marshall
16 Notary Public

17 My Commission Expires: 4-1-78



December 5, 1975

U AND I INCORPORATED
Sugar Industry Antitrust

HAND DELIVERED

Josef D. Cooper, Esq.
Cooper & Searpulla
300 Montgomery Street, Suite 600
San Francisco, California 94104

Dear Joe:

At your request I am confirming by letter our arrangements for serving upon defendants plaintiffs' papers which are to be filed today. You informed me that various papers to be filed by the plaintiffs are being prepared in San Francisco, Seattle and Chicago. We agreed that you will have hand delivered today when prepared all the service copies of the papers prepared in San Francisco to my office. All the service copies of the papers being prepared in Seattle will be hand delivered today when prepared to Peter Byrnes at the firm of Bogel & Gates, Bank of California Center, Seattle, Washington, and all the service copies of the papers being prepared in Chicago will be hand delivered today when prepared to Donald Breakstone at the firm of Mayer, Brown & Platt, 231 S. LaSalle Street, Chicago, Illinois.

In this connection I understand that you propose to file a paper with respect to the proposed settlements pursuant to agenda item G.1 which you requested on plaintiffs' behalf be placed on the agenda. Plaintiffs' counsel have brought the proposed settlements to the attention of the Court prior to the Court's acting with respect to the class action motions. Defendants, of course, cannot prevent plaintiffs from filing any papers that they wish and bringing up whatever subjects they may wish to raise with the Court on the agenda. Bob Raven, however, felt that I should put in writing what I think was clear without saying, and that is that defendants do not in any way acquiesce in the propriety of what has occurred nor do defendants waive any remedies they may have by recognizing plaintiffs' power to raise any subject plaintiffs wish and plaintiffs' power to file any papers plaintiffs wish.

Sincerely,

James F. Kirkham

cc: All Defense Counsel

Attachment to Supplemental Affidavit of Robert D. Raven

CERTIFICATE OF SERVICE BY MAIL

Rochelle D. Alpert hereby certifies:

That her business address is One Post Street, Suite 2700, San Francisco, California 94104, that she is an active member of the State Bar of California and that she is not a party to the cause.

That on the date hereof she served a copy of the following documents:

REPLY MEMORANDUM OF DEFENDANTS
IN SUPPORT OF MOTION TO DISQUALIFY
THE HONORABLE GEORGE H. BOLDT

by placing same in envelopes, addressed, respectively, to each person designated on the Service List (s) attached hereto, at the address indicated thereon.

That each such envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States mail at San Francisco, California.

Dated: November 29, 1976.

Rochelle D. Alpert
ROCHELLE D. ALPERT

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2 counsel appear below]

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4
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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 IN RE SUGAR ANTITRUST LITIGATION

Master File No. MDL 201

12
13 THIS DOCUMENT RELATES TO: ALL ACTIONS

ADOPTION OF REPLY
MEMORANDUM OF DEFENDANTS
IN SUPPORT OF MOTION TO
DISQUALIFY THE HONORABLE
GEORGE H. BOLDT

14
15
16 Defendants American Crystal Sugar Company, a dissolved
17 New Jersey corporation, and American Crystal Sugar Company, a
18 Minnesota agricultural cooperative, hereby adopt in support of
19 their motion for recusal herein those portions of the Reply Memo-
20 randum of Defendants In Support of Motion To Disqualify the Honor-
21 able George H. Boldt filed by defendants Amalgamated Sugar Company
22 and others on November 29, 1976 relating to 28 U.S.C. § 455 (a).

23 Dated: November 29, 1976.

24 LEON R. GOODRICH
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By Lois Omenn Rosenbaum
Lois Omenn Rosenbaum
Attorneys for Defendant
American Crystal Sugar Company,
a dissolved New Jersey corporation

1 CERTIFICATE OF SERVICE

2
3 I, LOIS OMENN ROSENBAUM, being an active member of
4 the State Bar of California, do hereby certify that I am an
5 associate of the firm of Orrick, Herrington, Rowley & Sutcliffe,
6 that my business address is 600 Montgomery Street, San Francisco,
7 California 94111, and that on Monday, November 29, 1976, I
8 caused a copy of the foregoing ADOPTION OF REPLY MEMORANDUM OF
9 DEFENDANTS IN SUPPORT OF MOTION TO DISQUALIFY THE HONORABLE
10 GEORGE H. BOLDT to be served by first class mail on each person
11 appearing on the Eighth Revised Service List for Plaintiff
12 Counsel, dated October 8, 1976, and Defendants' Revised Service
13 List, dated May 4, 1976.

14 On the same date, two copies were mailed to Judge Boldt
15 at the United States Court House, P. O. Box 1993, Tacoma,
16 Washington, pursuant to Paragraph VII(A) of Pretrial Order
17 No. 1.

18
19
20 Lois Omenn Rosenbaum
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1 (Appearances of counsel on
signature page)

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 IN RE SUGAR ANTITRUST LITIGATION)

Master File No.

12)
MDL 201

13 THIS DOCUMENT RELATES TO:

14 ALL ACTIONS)
15)
16)

17 REQUEST FOR ESTABLISHMENT OF SCHEDULE
18 FOR CONSIDERATION OF PROPOSED SETTLEMENTS
19

20 Plaintiffs' National Steering Committee (hereinafter
21 "Plaintiffs") has reached proposed settlements with three
22 defendants in these consolidated actions -- Holly Sugar
23 Corporation; Union Sugar Division, Consolidated Foods Corpora-
24 tion; and California and Hawaiian Sugar Company. The text
25 of the settlement agreement with Holly Sugar Corporation is
26 attached hereto as Exhibit A, and is herewith lodged with
27 the Court. Settlement agreements with Union Sugar Division,
28 Consolidated Foods Corporation and California and Hawaiian
29 Sugar Company are currently being drafted. Plaintiffs and
30 these settling defendants herewith request that the Court
31 establish a schedule for consideration and implementation of
32 these settlements. Plaintiffs and the settling defendants

1 suggest the following schedule for the Court's consideration:

2 December 19, 1975 - Lodge the settlement
3 agreements with Union Sugar
4 Division, Consolidated Foods
5 Corporation and California
6 and Hawaiian Sugar Company
7 with the Court.
8 January 9, 1976 - Plaintiffs and settling
9 defendants file proposed plan
10 of implementation of agreements
11 with the Court.
12 January 23, 1976 - Comments on proposed plan of
13 implementation filed by any
14 interested party.
15 February 6, 1976 - Reply to any comments filed
16 by plaintiffs and settling
17 defendants.
18
19 Hearing on proposed plan of
20 implementation on such date
21 as may be convenient to the
22 Court.
23

24 Plaintiffs and the settling defendants submit that establishment
25 of such a schedule would facilitate orderly consideration of
26 the proposed settlements.
27

28 Respectfully submitted,

29 Rayner H. Hamilton, Esq.
30 White & Case
31 14 Wall Street
New York, New York 10005

32 Counsel for Holly Sugar
Corporation

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13 Hawaiian Sugar Company

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17 Seattle, Washington 98171

18 By William H. Ferguson
19 William H. Ferguson
20 Chairman, Plaintiffs' National
21 Steering Committee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

Master File No.
MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

STIPULATION AND
AGREEMENT OF
SETTLEMENT

WHEREAS, plaintiffs commenced these actions in their individual capacities or as class actions on behalf of themselves and other persons similarly situated;

WHEREAS, plaintiffs in their individual and class action claims alleged, in substance, that Holly Sugar Corporation ["Holly"] and others engaged inter alia in a conspiracy in violation of Section 1 of the Sherman Act; and

WHEREAS, Holly has filed answers in which it denied all material allegations of the complaints, raised certain affirmative defenses, and asserted certain counter-claims against plaintiffs and class members; and

WHEREAS, counsel for plaintiffs in these actions have conducted investigations of the facts, circumstances and transactions involved in these actions, including discovery and inspection of records, documents, reports of congressional hearings, governmental studies, and other papers in connection therewith; and

WHEREAS, while denying and disclaiming wrongdoing of any kind whatsoever, Holly nevertheless has agreed to enter into this Stipulation and Agreement solely in order to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation and finally to put to rest all claims alleged or which might have been alleged in these actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law;

NOW, THEREFORE, it is stipulated and agreed by and among the undersigned that these actions shall be settled and compromised, upon approval of this Court after a hearing as provided for herein, on the following terms and conditions:

1. The undersigned represent that they are authorized to execute this Agreement and take all steps

contemplated by this Agreement to effectuate this settlement on behalf of Plaintiffs' Steering Committee and on behalf of Holly respectively, and that they will take all steps on behalf of such respective parties that this Agreement contemplates.

2. The intent and purpose of this Agreement is: (a) to enable Holly to effect full and final settlement of all claims against it by plaintiffs in the non-class actions captioned above, as well as by named plaintiffs in the class actions and members of the classes defined in paragraph 3 hereof, which were alleged or could have been alleged in these consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law, or which are based on or related to any facts, matters or claims which were alleged or could have been alleged in the above-captioned consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law; and (b) to enable said plaintiffs and class members to effect full and final settlement of all counterclaims and potential counterclaims against them by Holly, based on or related to any facts, matters or claims which were alleged

or could have been alleged in its answers and counter-claims in the above-captioned consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law.

3. For purposes of this settlement only and subject to the Court's approval it is stipulated and agreed that the parties will forthwith move the Court to establish the following classes for settlement purposes for each of the three (3) market areas during the time periods indicated: (i) Chicago-West Territory, consisting of the states of Indiana, Illinois, Iowa, Minnesota, Wisconsin, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Montana, Missouri, New Mexico, Oklahoma, Texas and Wyoming (east of the town of Rawlins) during the period from January 1, 1955 to the date of this Stipulation and Agreement of Settlement; (ii) California-Arizona Territory, consisting of the states of California and Arizona and the cities of Las Vegas and Reno, Nevada during the period from January 1, 1949 to the date of this Stipulation and Agreement of Settlement; and (iii) Intermountain-Northwest Territory, consisting of the states of Washington, Oregon, Utah, Idaho and

Wyoming (west of the town of Rawlins) during the period January 1, 1949 to the date of this Stipulation and Agreement of Settlement.

A. Industrial users which have directly or indirectly purchased refined sugar* for use or incorporation in producing, manufacturing or processing foodstuffs, including beverages, for human consumption and agricultural uses, which did not offer such sugar for resale as refined sugar, and excluding (i) the Defendants, their subsidiaries and affiliated business entities, (ii) members of the public at large who purchased for non-business use, (iii) governmental entities, and (iv) each plaintiff which filed its own non-class action. These industrial users include but are not limited to restaurants, franchisees of franchisors of restaurants, hospitals and health care institutions, vending machine operators, and manufacturers or processors of the following products, among others: ice cream and other dairy products, beverages

* As used in this Agreement the term "refined sugar" means any grade, type or form of sucrose, dextrose or levulose or any other saccharine product or by-product derived from the processing of sugar beets or the refining of sugar cane, including but not limited to molasses.

including carbonated and non-carbonated beverages, wines and beers, confectionary products, canned, bottled and frozen foods (including jams, jellies and preserves), bakery goods, cereal and allied products, animal feed, and other agricultural products. Restaurants included within this class shall be limited to those restaurants which are or were, during the relevant time (a) members of the National Restaurant Association, the Foodservice and Lodging Institute, or their local affiliated organizations, or (b) franchisees of franchisors which are or were engaged in the business of franchising restaurants. Hospitals and health care institutions included within this class shall be limited to those identified in the American Hospital Association's Annual Directory - Guide to the Health Care Field, or members of the Federation of American Hospitals.

B. Retail grocers which directly or indirectly have purchased refined sugar and which in any year had gross annual sales of \$150,000 or more, and excluding (i) the Defendants, their subsidiaries and affiliated business entities, and (ii) each plaintiff which filed its own non-class action. A business operating more than one retail grocery store shall aggregate its gross annual sales for all stores to meet the gross annual sales requirement.

C. Governmental entities including states, cities, counties, and other political subdivisions and public entities, specifically including hospitals and school districts, which have directly or indirectly purchased or paid for refined sugar.)

D. All wholesalers which directly or indirectly purchased refined sugar for resale, and excluding (i) the Defendants, their subsidiaries and affiliated business entities, and (ii) each plaintiff which filed its own non-class action. It is understood that the term "wholesaler" excludes brokers who do not purchase refined sugar for their own account.

4. Pursuant to this Agreement, Holly will pay the sum of Five Million Dollars (\$5,000,000) (hereinafter the "Settlement Amount") in complete, total and final settlement and satisfaction of all claims against Holly which were alleged or could have been alleged in these consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law, or which are based on or related to any facts, matters or claims which were alleged or which could have been alleged in these consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law, as well as all claims

against Holly for attorneys' fees and costs, said sum to be held in trust subject to the conditions set forth herein.

5. The Settlement Amount and any income thereon (hereinafter the "Settlement Fund") shall be held in trust under the supervision of two trustees. One trustee shall be appointed by Holly and the second trustee shall be appointed by Plaintiffs' Steering Committee. Holly hereby appoints its Secretary and General Counsel, Clarold F. Morgan, to act as trustee. The Plaintiffs hereby appoint William H. Ferguson, Chairman, Plaintiffs' Steering Committee to act as trustee. Each of said trustees shall act in accordance with the terms of this Agreement. A trustee may resign by written notice to, or be removed by, the party which appointed him. Until such time as the trustee appointed by Holly resigns in accordance with paragraph 6 hereof, any successor trustee shall be chosen solely by the party who had originally appointed the trustee being replaced. From time to time the trustees, with Court approval, will be reimbursed out of the Settlement Fund for incidental costs and expenses incurred in the administration and distribution of the Settlement Fund. The Holly trustee shall serve without compensation. Subsequent to the resignation of the Holly trustee, the trustees appointed by the Plaintiffs' Steering

Committee may petition the Court as may be appropriate for compensation to be disbursed from the Settlement Fund. The trustees shall have no duties except those which are expressly set forth herein. The trustees may confer with counsel in respect of any question relating to their duties or responsibilities hereunder and they shall not be liable for any act done or omitted by them in good faith on advice of such counsel. Holly and the Plaintiffs' Steering Committee hereby jointly and severally agree to indemnify and hold harmless the trustees against all expenses and liabilities incurred (including, without limiting the generality of the foregoing, litigation expenses, judgments and settlement costs) and all advances made by the trustees prior to the resignation of the Holly trustee pursuant to paragraph 6 hereof arising from or in connection with the acceptance and administration of this trust, except such as result from their negligence or wilful misconduct. All obligations on the part of Holly to indemnify shall cease at the time of the resignation of the Holly trustee in accordance with the terms of paragraph 6. Subsequent to the resignation of the Holly trustee, the Plaintiffs' Steering Committee shall indemnify and hold harmless the trustees against all expenses and liabilities incurred (including, without limiting the generality of the foregoing, litigation expenses, judgments and settlement costs) and all

advances made by the trustee arising from or in connection with the acceptance and administration of this trust.

The trustees shall not be liable or responsible for anything done or omitted to be done by them in good faith, it being understood that their liability hereunder shall be limited solely to negligence or wilful misconduct on their part. Any successor trustee shall be bound by all the provisions of this Agreement upon his acceptance thereof and shall have all of the power and authority as if originally named as trustee herein.

6. The trustee appointed by Holly shall resign his position at the latest of the following dates:

A. If the order described in paragraph 11 hereof is entered, then thirty (30) days from the date when the right of any person to appeal from such order and judgment has expired; or, if an appeal is taken from such order and judgment, then thirty (30) days from the date when such order and judgment are affirmed and are no longer subject to judicial review;

B. Thirty (30) days after such time as Holly's rights to withdraw from this Agreement pursuant to paragraph 12 shall expire.

7. Subsequent to the resignation of the trustee appointed by Holly in accordance with the terms of

paragraph 6 hereof, a successor trustee in place of the Holly trustee shall be appointed solely by the Plaintiffs.

8. Holly shall pay the Settlement Amount over to the trustees in such manner as the trustees shall direct upon the effectiveness of this Agreement as provided in paragraph 24 hereof.

9. The Settlement Fund shall be held in trust subject to the following conditions, in addition to any other conditions contained in this Agreement:

A. The trustees shall act by unanimous action in accordance with the terms of this Agreement. In the event the trustees are unable to agree on any matter relating to the investment, disbursement or administration of the Settlement Fund, either trustee may, upon notice, move the Court for an order as to the proper handling of the Settlement Fund in accordance with the terms of this Agreement.

B. The trustees shall invest all or a portion of the Settlement Fund in such manner as shall in their judgment generate the highest rate of interest consistent with security, including, but not limited to, prime commercial paper of industrial utility and national banking corporations (including the parent holding company of such banking corporation),

certificates of deposit of national banks, United States Treasury bonds, bills and notes, or similar investments, pending distribution of the Settlement Fund. All income earned on the Settlement Fund shall become and remain a part of the Settlement Fund.

C. Except as provided in paragraph 5, subparagraph 9.D and paragraph 14 hereof, the trustees shall be without power to authorize the disbursement of the Settlement Fund, including income therefrom, or any part thereof, until such time as the trustee appointed by Holly shall resign in accordance with the terms of paragraph 6 of this Agreement.

D. Notwithstanding subparagraph 9.C hereof, the parties agree that up to \$50,000.00 of the Settlement Fund may be used, upon Court approval, for the payment of the cost of notice to the settlement classes herein defined. The parties contemplate that the cost of notice will not exceed \$50,000.00. Should the cost of notice to the settlement classes exceed this sum, Holly shall pay the excess over \$50,000.00. However, should the notice encompass

litigation classes as well as settlement classes, the parties will confer and agree upon an appropriate apportionment between Holly and Plaintiffs of the cost in excess of \$50,000.00. Moreover, should the notice include settlement with one or more Defendants in addition to Holly, Holly shall be relieved of its obligation to pay the excess over \$50,000.00.

E. Subsequent to the resignation of the Holly trustee in accordance with the terms of paragraph 6 herein, disbursements from the Settlement Fund, including such awards as may be made by the Court for counsel fees and costs, may be made, with Court approval, upon application of the trustees.

10. As soon as possible after the execution of this Stipulation and Agreement of Settlement, counsel shall submit this Stipulation and Agreement of Settlement to the Court for preliminary approval, together with a proposed order, consented to by the parties signatory hereto,

A. Requiring appropriate notice to be given to class members;

B. Directing a hearing to be held to determine the reasonableness, adequacy and fairness of the

proposed settlement and whether it should be approved by the Court.

C. Providing that any class member or other appropriate person who objects to the approval of this Agreement or to the judgment to be entered hereon may appear at the hearing and show cause why the settlement proposed herein should not be approved as fair, reasonable and adequate and why a judgment should not be entered hereon;

D. Requiring that the objection of any such person must be made in writing and that such objection together with any supporting papers must be filed with the Court seven (7) days prior to the hearing set by the Order;

E. Reserving jurisdiction over the effectuation of the settlement provided for herein for all purposes and resolving any disputes that may arise.

F. Providing that all class members who do not timely file a request for exclusion shall be barred from prosecuting any claims which were alleged or could have been alleged in the above-captioned consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law, or which are

based on or related to any facts, matters or claims which were alleged or could have been alleged in said actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law.

G. Requiring that all plaintiffs in non-class actions who do not choose to participate in the settlement to file an appropriate written notice with the Court seven (7) days prior to the hearing referred to in subparagraph 10.B hereof and providing that all Plaintiffs in non-class actions who do not timely file such notice shall be barred from prosecuting any claims which were alleged or could have been alleged in the above-captioned consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law or which are based on or related to any facts, matters or claims which were alleged or could have been alleged in said actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law.

11. Following final approval by the Court of the settlement, Plaintiffs and Holly shall jointly file a motion for an Order,

A. Declaring the above-captioned actions which were instituted as class actions be properly maintained as class actions for the purposes of this settlement only, pursuant to F.R.C.P. 23 on behalf of all members of the classes set forth in paragraph 3 hereof;

B. As to Holly, dismissing on the merits and with prejudice the complaints in all the above-captioned actions wherein the Plaintiffs have not requested exclusion from the settlement in accordance with subparagraphs 10.F and 10.G.

C. Barring all Plaintiffs and class members who did not timely file a request for exclusion in accordance with subparagraphs 10.F and 10.G from prosecuting any claims which were alleged or could have been alleged in the above-captioned actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law or which are based on or related to any facts, matters or claims which were alleged or could have been alleged in said actions up to the date

of this Agreement pertaining to refined sugar and based on or related to any federal or state anti-trust law.

12. The parties shall have the right to withdraw from this Agreement in the following instances:

A. If a consumer class consisting of persons who purchased sugar at retail for use or consumption is certified for litigation purposes prior to the entry of judgment dismissing Holly from the actions listed on Appendix A hereto and such judgment having become final (not appealable) each party shall have the right to withdraw from this Agreement within fifteen (15) days after such certification.

B. Should the Court certify settlement classes which are narrower than those classes defined in paragraph 3 hereof, Holly shall have the right to withdraw from this Agreement within fifteen (15) days of such certification.

C. Within fifteen (15) days after the deadline set by the Court for class members to exclude themselves from the classes or for non-class Plaintiffs to exclude themselves from the settlement (paragraphs 10.F and 10.G hereof), Holly shall have the right to

withdraw from the Agreement if in Holly's sole judgment the exclusions are significant.

13. The exercise by any party of any rights to withdraw from this Agreement shall be accomplished by service of written notice of withdrawal on the trustees of the Settlement Fund via registered mail.

14. In the event that for any reason this Agreement shall be disapproved by the Court, or approved but reversed on appeal, or should either party withdraw therefrom pursuant to its terms,

A. This Agreement shall be null and void;

B. Notwithstanding paragraphs 4 through 9 herein, the Settlement Fund, plus interest and less authorized disbursements (including the costs of notice previously advanced), shall immediately be returned to Holly; and

C. This Agreement shall have no further force and effect, and shall be without prejudice to the rights and contentions of Holly or Plaintiffs herein or in any other action.

15. In the event that the Settlement Fund is returned to Holly pursuant to paragraph 14 and disbursements have been made therefrom, such disbursements shall be apportioned as follows:

A. If Holly withdraws from this Agreement pursuant to paragraph 12 the full costs of class notice and administration of the Settlement Fund to the extent theretofore incurred shall be borne by Holly;

B. If Plaintiffs' Steering Committee withdraws from this Agreement pursuant to paragraph 12 the full costs of class notice and administration of the Settlement Fund to the extent theretofore incurred shall be borne by Plaintiffs' Steering Committee, and such Committee shall promptly pay the amount of such costs to Holly;

C. If both parties mutually withdraw from this Agreement pursuant to paragraph 12, the full costs of class notice and administration of the Settlement Fund to the extent theretofore incurred shall be borne equally by both parties, and Plaintiffs' Steering Committee shall promptly pay its share of such costs to Holly;

D. If this Agreement is disapproved by the Court or an order and judgment approving the settlement and dismissing the above-captioned actions is appealed from and subsequently reversed, the full costs of class notice and administration to the extent theretofore incurred shall be borne equally by

both parties, and Plaintiffs' Steering Committee shall promptly pay its share of such costs to Holly.

16. Neither this Agreement nor any proceedings hereunder shall in any event be construed as or deemed to be, evidence or any admission, on the part of Plaintiffs, of lack of merit in these actions or, on the part of the Defendant Holly Sugar Corporation or any of its agents, attorneys, employees, officers or directors, an admission of any liability or wrongdoing whatsoever, or of the truth of the allegations of the complaints, or the propriety of the classes defined in paragraph 3 hereof or of lack of merit in any of its counterclaims or defenses, nor shall this Agreement, or any of the terms hereof, or any of the negotiations or proceedings connected herewith, be offered or received in evidence for any purpose other than for purposes of these settlement and dismissal proceedings, and, without limitation, they shall not be used as an admission of any wrongful or illegal activity on the part of Defendant Holly Sugar Corporation or any of its present or former agents, attorneys, employees, officers, directors or partners, or of any liability whatsoever by any of them, or as an admission of any of the allegations contained in the complaints in these actions. Neither this Agreement nor participation in any proceeding hereunder

shall be deemed to be or to constitute a waiver by Holly of any defense or counterclaim which it may have in these actions.

17. Neither this Agreement or any document executed pursuant hereto shall be construed as a release by Plaintiffs and class members except that it shall be construed as a covenant by Plaintiffs and class members not to sue Holly and its present and former officers, directors, employees and agents on any claims or causes of action which were alleged or could have been alleged in these consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law, or which are based on or related to any facts, matters or claims which were alleged or could have been alleged in the above-captioned consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law. Plaintiffs and class members reserve the right to proceed against or sue any person, firm or corporation other than Holly and its present and former officers, directors, employees and agents with respect to all claims or causes of action asserted in the consolidated actions listed in Appendix A hereof, including without limitation claims based on purchases of refined sugar from Holly.

18. Neither this Agreement or any document executed pursuant hereto shall be construed as a release by Holly, except that it shall be construed as a covenant by Holly not to sue only the following specified individuals or entities on any claims or causes of actions which were alleged or could have been alleged in these consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law, or which are based on or related to any facts, matters or claims which were alleged or could have been alleged in the above-captioned consolidated actions up to the date of this Agreement pertaining to refined sugar and based on or related to any federal or state antitrust law: (a) the named Plaintiffs who are parties to this settlement; (b) class members who do not opt out of the settlement classes; and (c) their present and former officers, directors, employees and agents. Holly reserves the right to proceed against or sue any person, firm or corporation who does not participate in this settlement with respect to all claims or causes of action asserted in Holly's counterclaims in the consolidated actions listed in Appendix A hereto.

19. Holly hereby agrees that its records and personnel will remain available for discovery and trial in the event that this settlement is consummated as if Holly were still a named Defendant in the actions listed in Appendix A hereto.

20. Upon dismissal with prejudice of Holly from the consolidated actions listed in Appendix A hereto, Holly agrees to simultaneously dismiss with prejudice each and every counterclaim against the named Plaintiffs who participate in the settlement and class members who do not opt out of the settlement classes which it has heretofore asserted in any and all of these actions pertaining to refined sugar and based on or related to any federal or state antitrust law. All other counterclaims shall be dismissed without prejudice.

21. All parties to this Agreement will cooperate in the prompt submission of this Agreement to the Court, will take all steps that may be requested by the Court, and will otherwise use their best efforts to consummate this settlement and to obtain the entry of a final judgment of dismissal with prejudice against Holly in the actions listed in Appendix A hereto.

22. If this Agreement shall become null and void by reason of the exercise of any of the rights of

withdrawal provided in paragraph 12 hereof or for any other reason, then this Agreement and any and all negotiations and proceedings relating thereto or had in connection therewith shall be without prejudice to the status quo ante rights of any and all of the parties hereto.

23. All matters pending in any of these actions are stayed with respect to Holly, except discovery and those matters necessary to conclude the settlement of these actions, until this settlement is finally effectuated or fails according to the terms of this Agreement.

24. This Agreement may be executed in counterparts by the parties hereto, each of which shall be deemed an original and which together shall constitute one and the same instrument, and will become effective upon its execution by Rayner M. Hamilton, Esq. on behalf of Holly, and its execution by any ten (10) members of Plaintiffs' Steering Committee on behalf of said Committee.

IN WITNESS WHEREOF, each of the parties hereto has executed this Stipulation and Agreement of Settlement as of November 21, 1975.

HOLLY SUGAR CORPORATION

By Rayner M. Hamilton
Rayner M. Hamilton

PLAINTIFFS' STEERING COMMITTEE

By Robert S. Atkins

By Joseph L. Alioto

By Maxwell M. Blecher

By Thomas L. Boeder

By John E. Burke

By John A. Cochrane

By Howard M. Downs

By William H. Ferguson

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has executed this Stipulation and Agreement of Settlement
as of November 21, 1975.

HOLLY SUGAR CORPORATION

By _____
Rayner M. Hamilton

PLAINTIFFS' STEERING COMMITTEE

By Robert S. Atkins
Robert S. Atkins

By _____
Joseph L. Alioto

By _____
Maxwell M. Blecher

By _____
Thomas L. Boeder

By John E. Burke
John E. Burke

By _____
John A. Cochrane

By _____
Howard M. Downs

By _____
William H. Ferguson

By _____
Lee A. Freeman

By _____
Frederick P. Furth

By _____
David B. Gold

By Perry Goldberg
Perry Goldberg

By _____
J. Nathaniel Hamrick

By _____
Elwood Kendrick

By _____
Harold E. Kohn

By _____
Richard N. Light

By _____
Albert R. Malanca

By _____
Guido Saveri

By Jerome H. Torshen
Jerome H. Torshen

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has executed this Stipulation and Agreement of Settlement
as of November 21, 1975.

HOLLY SUGAR CORPORATION

By Rayner M. Hamilton

PLAINTIFFS' STEERING COMMITTEE

By Robert S. Atkins

By Joseph L. Alioto

By Maxwell M. Blecher

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By Thomas L. Boeder

By John E. Burke

By John A. Cochrane

By Howard M. Downs

By William H. Ferguson

By Lee A. Freeman

By Frederick P. Furth

By David B. Gold (PB)
David B. Gold

By Perry Goldberg

By J. Nathaniel Hamrick

By Elwood Kendrick

By Harold E. Kohn

By Richard N. Light

By Albert R. Malanca

By Guido Saveri
Guido Saveri

By Jerome H. Torshen

By Lee A. Freeman

By Frederick P. Furth

By David B. Gold

By Perry Goldberg

By J. Nathaniel Hamrick

By Elwood Kendrick

By Harold E. Kohn

By Richard N. Light

By Albert R. Malanca
Albert R. Malanca

By Guido Saveri

By Jerome H. Torshen

By Lee A. Freeman

By Frederick P. Furth

By David B. Gold

By Perry Goldberg

By J. Nathaniel Hamrick

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By Harold E. Kohn

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By Howard M. Downs

By William H. Ferguson

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By Frederick P. Furth

By David B. Gold

By Perry Goldberg

By J. Nathaniel Hamrick

By Elwood Kendrick

By Harold E. Kohn

By Richard N. Light

By Albert R. Malanca

By Guido Saveri

By Jerome H. Torshen

APPENDIX A

Cases filed as of November 21, 1975

C75 2687 GHB - SUN GARDEN PACKING COMPANY

C74 2689 GHB - ENG-SKELL COMPANY

C74 2695 GHB - ZIM'S RESTAURANTS, INC.

C74 2698 GHB - ZIM'S RESTAURANTS, INC.

C74 2711 GHB - PAOLI'S RESTAURANTS, INC.

C74 2727 GHB - FANTASIA CONFECTIONS, INC.

C74 2728 GHB - FANTASIA CONFECTIONS, INC.

C75 0041 GHB - RALEY'S, INC.

C75 0117 GHB - BLUM'S OF SAN FRANCISCO

C75 0504 GHB - FOOD MART-EUREKA

C74 0505 GHB - OWENS ENTERPRISES, INC.

C74 0782 GHB - BOARD OF EDUCATION OF THE
CITY OF BERKELEY

C75 1120 GHB - GENESIS GROUP, INC.

C75 1121 GHB - SUPERIOR BEVERAGE COMPANY, INC.

C75 1122 GHB - BALDI CANDY COMPANY

C75 1123 GHB - HEINEMANN'S, INC.

C75 1124 GHB - STATE OF ILLINOIS

C75 1125 GHB - PLANTATION BAKING COMPANY, INC.

C75 1126 GHB - ZION INDUSTRIES, INC.

C75 1127 GHB - TREASURE ISLAND FOODS, INC.

C75 1128 GHB - HOME JUICE COMPANY

C75 1129 GHB - STATE OF WASHINGTON

C75 1130 GHB - WASHINGTON BEVERAGES, INC.

C75 1131 GHB - SEECO, INC.

C75 1401 GHB - STATE OF CALIFORNIA

C75 1404 GHB - MOTHER'S CAKE & COOKIE CO.

C75 1424 GHB - SCANDIA BAKERY

C75 1441 GHB - STATE OF OREGON

C75 1454 GHB - NORTHWEST CANDY, INC.

C75 1455 GHB - EWALD BROS., INC.

C75 1456 GHB - STATE OF MINNESOTA

C75 1543 GHB - ITT CONTINENTAL BAKING COMPANY
C75 1544 GHB - ITT CONTINENTAL BAKING COMPANY
C75 1545 GHB - KING KELLY MARMALADE COMPANY
C75 1546 GHB - GENERAL BOTTLERS, INC.
C75 1553 GHB - MERCHANTS RESTAURANT, INC.
C75 1554 GHB - SCHULZE AND BURCH BISCUIT CO.
C75 1555 GHB - GRIST MILL CO.
C75 1606 GHB - THE BROTHERS RESTAURANTS, INC.
C75 1674 GHB - STEAK-O-RAMA
C75 1696 GHB - ZARDA BROTHERS DAIRY
C75 1730 GHB - SMITH COOKIE COMPANY
C75 1731 GHB - 1812 DISTRIBUTING
C75 1756 GHB - UNITED A.G. COOPERATIVE
C75 1808 GHB - MISSOURI FARMERS ASSOCIATION
C75 1824 GHB - JOHN'S FOOD CENTERS
C75 1908 GHB - BRESLER ICE CREAM
C75 1909 GHB - INTERNATIONAL INDUSTRIES
C75 1910 GHB - INTERNATIONAL INDUSTRIES
C75 1911 GHB - INTERNATIONAL INDUSTRIES
C75 1912 GHB - ORANGE JULIUS OF AMERICA
C75 1931 GHB - STATE OF COLORADO
C75 1957 GHB - BENNER TEA COMPANY
C75 1973 GHB - THE PANIPLUS CO.
C75 2024 GHB - PASSENGERS RESTAURANTS
C75 2025 GHB - MILFORD CANNING CO.
C75 2026 GHB - TRI-R VENDING SERVICE
C75 2027 GHB - SETHNESS GREENLEAF INC.
C75 2190 GHB - HAROLD FREUND BAKING CO.
C75 2191 GHB - CFS CONTINENTAL--LOS ANGELES, INC.
C75 2247 GHB - COURTESY FOOD MART, INC.
C75 2350 GHB - STATE OF KANSAS
C75 2400 GHB - STATE OF WISCONSIN
C75 2457 GHB - SCHWAN'S SALES ENTERPRISES, INC.
C75 2581 GHB - STATE OF ARIZONA
75C 3689 - GOELITZ CONFECTIONARY COMPANY
(Northern District of Illinois, Eastern Division)

ORIGINAL
FILED

AUG 17 1976

CLERK, U. S. DIST. COURT,
SAN FRANCISCOUNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

Master File No.

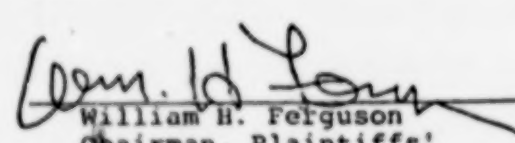
MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Plaintiffs herewith lodge with the Court the
Stipulation and Agreement of Settlement between defendants,
Holly Sugar Corporation, California and Hawaiian Sugar Company,
and Union Sugar Division, Consolidated Foods Corporations
and plaintiffs in the Industrial-User, Retail Grocer and
Wholesaler Classes.

DATED: August 16, 1976


William H. Ferguson
Chairman, Plaintiffs'
Steering Committee

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 ----- Master File No.
12 IN RE SUGAR ANTITRUST LITIGATION) MDL 201
13 -----) STIPULATION AND AGREE-
14 -----) MENT OF SETTLEMENT

15 WHEREAS, plaintiffs are maintaining certain
16 actions (identified in Appendix A) in their individual
17 capacities or as class actions on behalf of themselves and
18 other persons similarly situated;

19 WHEREAS, plaintiffs in their individual and class
20 action claims allege, in substance, that Holly Sugar
21 Corporation ("Holly"), California and Hawaiian Sugar Company
22 ("C and H"), and Union Sugar Division, Consolidated Foods
23 Corporation ("Union") (hereinafter collectively referred to
24 as "Defendants"), and others engaged inter alia in a
25 conspiracy in violation of Section 1 of the Sherman Act; and

26 WHEREAS, Defendants filed separate answers in
27 which they denied all material allegations of the
28 complaints, raised certain affirmative defenses, and
29 asserted certain counterclaims against certain plaintiffs
30 and class members; and

1 WHEREAS, C and H is an agricultural marketing co-
2 operative organized under California law and engaged in
3 marketing on a cooperative basis the raw sugar produced in
4 Hawaii by its members and patrons; and

5 WHEREAS, C and H is entering this Agreement both
6 on its own behalf and on behalf of the following named
7 entities, each being a member of C and H or the parent
8 corporation of a member (hereinafter called "C and H
9 members"): Alexander & Baldwin, Inc.; Amfac, Inc.; C.
10 Brever and Company, Limited; Castle & Cooke, Inc.; Cay &
11 Robinson, Inc.; Grove Farm Company, Incorporated (A former
12 member that discontinued business December 31, 1973);
13 Hawaiian Commercial and Sugar Company (A Division of
14 Alexander & Baldwin); Hawaiian Sugar Company, Limited;
15 Honokaa Sugar Company; Ka'u Sugar Company, Inc.; Kekaha
16 Sugar Company, Limited; Kohala Sugar Company; Laupahoehoe
17 Sugar Company; The Lihue Plantation Company, Limited; Mauna
18 Kea Sugar Co., Inc.; McBryde Sugar Company, Limited; Oahu
19 Sugar Company, Limited; Olokele Sugar Company, Limited;
20 Pioneer Mill Company, Limited; Puna Sugar Company, Limited;
21 Theo. H. Davies & Co., Ltd.; Waialua Sugar Company, Inc.;
22 Wailuku Sugar Company; and

23 WHEREAS, counsel for plaintiffs in these actions
24 have conducted investigations of the facts, circumstances
25 and transactions involved in these actions, including dis-
26 covery and inspection of records, documents, reports of con-
27 gressional hearings, governmental studies, and other papers
28 in connection therewith; and

29 WHEREAS, Holly entered into a Stipulation and
30 Agreement of Settlement with Plaintiffs' Steering Committee

1 on November 21, 1975 whereby Holly agreed to pay the sum of
2 Five Million Dollars (\$5,000,000) in complete, total and
3 final settlement and satisfaction of all claims against
4 Holly which were alleged or could have been alleged in the
5 consolidated actions as more fully set forth in said
6 Agreement; and

7 WHEREAS, C and H entered into a Stipulation and
8 Agreement of Settlement with Plaintiffs' Steering Committee
9 on January 19, 1976 whereby C and H agreed to pay the sum of
10 Sixteen Million Five Hundred Thousand Dollars (\$16,500,000)
11 in complete, total and final settlement and satisfaction of
12 all claims against C and H and the C and H members which
13 were alleged or could have been alleged in the consolidated
14 actions as more fully set forth in said Agreement; and

15 WHEREAS, Union entered into a Stipulation and
16 Agreement of Settlement with Plaintiffs' Steering Committee
17 on January 30, 1976 whereby Union agreed to pay the sum of
18 Two Million Five Hundred Thousand Dollars (\$2,500,000) in
19 complete, total and final settlement and satisfaction of all
20 claims against Union which were alleged or could have been
21 alleged in the consolidated actions as more fully set forth
22 in said Agreement;

23 WHEREAS, by order of the Court dated May 20, 1976,
24 certain classes were certified for litigation purposes upon
25 application of the Plaintiffs; and

26 WHEREAS, the parties hereto have rescinded the
27 aforesaid Stipulations and Agreements of Settlement upon the
28 terms and conditions set forth herein; and

29 WHEREAS, while denying and disclaiming wrongdoing
30 of any kind whatsoever, Defendants nevertheless agreed to

1 enter into the aforesaid Stipulations and Agreements and
2 agree to enter into this Stipulation and Agreement on their
3 own behalf and, in the case of C and H, on behalf of the C
4 and H members, solely in order to avoid further expense,
5 inconvenience and the distraction of burdensome and
6 protracted litigation and finally to put to rest all claims
7 against defendants and the C and H members alleged or which
8 might have been alleged in these actions up to the date of
9 this Agreement pertaining to refined sugar and based on or
10 related to any federal or state antitrust law;

11 NOW, THEREFORE, it is stipulated and agreed by and
12 among the undersigned that these actions shall be settled
13 and compromised, upon approval of this Court after a hearing
14 as provided for herein, on the following terms and
15 conditions:

16 1. The undersigned attorneys represent and
17 promise, for themselves and their respective clients in this
18 litigation, that each will cooperate in the prompt
19 submission of this Agreement to the Court, will take all
20 steps that may be requested by the Court, and will otherwise
21 use their best efforts to consummate this settlement and to
22 obtain the entry of a final judgment of dismissal with
23 prejudice in these actions against defendants and the C and
24 H members.

25 2. The intent and purpose of this Agreement is
26 to enable defendants to effect full and final settlement of
27 all claims against them and the C and H members by (a) named
28 plaintiffs and members of certain plaintiff classes and
29 subclasses certified by the Court in its order of May 20,
30 1976 as set forth as Classes One, Two and Three in Appendix

1 B hereto, (b) named plaintiffs and members of a plaintiff
2 class of wholesalers proposed by certain plaintiffs in a
3 motion for clarification and/or modification filed on or
4 about June 7, 1976, as set forth as Class Four in Appendix B
5 hereto and (c) plaintiffs who have filed actions on their
6 own behalf who otherwise would be members of one of the
7 classes described in Appendix B (all of said persons who do
8 not reject this Agreement being herein sometimes called the
9 "settling claimants") with respect to all claims which were
10 alleged or could have been alleged in the actions identified
11 in Appendix A up to the date of this Agreement pertaining to
12 refined sugar and based on or related to any federal or
13 state antitrust law, or which are based on or related to any
14 facts, matters or claims which were alleged or could have
15 been alleged in these actions up to the date of this
16 Agreement pertaining to refined sugar and based on or
17 related to any federal or state antitrust law. This Settlement
18 is intended to encompass all claims against defendants
19 and the C and H members, arising from purchases of refined
20 sugar by the settling claimants from any person in any of
21 the three market areas set forth in Appendix B (hereinafter
22 "the markets") and does not cover purchases outside the
23 three market areas. The place of delivery of the refined
24 sugar to each settling claimant shall be the sole determinant
25 of whether the purchase is encompassed within this
26 Settlement.

27 3. The intent and purpose of this Agreement also
28 is to enable the settling claimants to effect full and final
29 settlement of all counterclaims and potential counterclaims
30 against them by defendants, based on or related to any

1 facts, matters or claims which were alleged or could have
2 been alleged in their answers and counterclaims in these
3 actions up to the date of this Agreement pertaining to
4 refined sugar purchased in the markets and based on or
5 related to any federal or state antitrust law.

6 4. Pursuant to this Agreement, and subject to
7 the provisions of paragraph 9.F hereof, Holly will pay the
8 sum of Five Million Dollars (\$5,000,000), C and H will pay
9 the sum of Sixteen Million Five Hundred Thousand Dollars
10 (\$16,500,000) and Union will pay the sum of Two Million Five
11 Hundred Thousand Dollars (\$2,500,000) (hereinafter the
12 "Settlement Amount") in complete, total and final settlement
13 and satisfaction of all claims by the settling claimants
14 against defendants and the C and H members which were
15 alleged or could have been alleged in these actions up to
16 the date of this Agreement pertaining to refined sugar
17 purchased in the markets and based on or related to any
18 federal or state antitrust law, or which are based on or
19 related to any facts, matters or claims which were alleged
20 or which could have been alleged in these actions up to the
21 date of this Agreement pertaining to refined sugar purchased
22 in the markets and based on or related to any federal or
23 state antitrust law, as well as all claims against
24 defendants and the C and H members for attorneys' fees and
25 costs, said sum to be held in trust subject to the
26 conditions set forth herein.

27 5. The Settlement Amount and any income thereon
28 (hereinafter the "Settlement Fund") shall be held in trust
29 under the supervision of four trustees. One trustee shall
30 be appointed by each defendant and the fourth trustee shall

1 be appointed by the relevant members of the Plaintiffs'
2 Steering Committee. Holly hereby appoints its Secretary and
3 General Counsel, Clarold F. Morgan, Esq., to act as trustee.
4 C and H hereby appoints its Secretary and General Counsel,
5 Donald P. Falconer, Esq. to act as trustee. Union hereby
6 appoints William T. White, Jr. to act as trustee. The
7 plaintiffs hereby appoint William H. Ferguson, Esq.,
8 Chairman, Plaintiffs' Steering Committee to act as trustee.
9 Each of said trustees shall act in accordance with the terms
10 of this Agreement. A trustee may resign by written notice
11 to, or be removed by, the party which appointed him. Until
12 such time as the trustee appointed by each defendant resigns
13 in accordance with paragraph 6 hereof, any successor trustee
14 shall be chosen solely by the party who had originally
15 appointed the trustee being replaced. From time to time the
16 trustees, with Court approval, will be reimbursed out of the
17 Settlement Fund for incidental costs and expenses incurred
18 in the administration and distribution of the Settlement
19 Fund. The defendants' trustees shall serve without
20 compensation. Subsequent to the resignation of all
21 defendants' trustees pursuant to paragraph 6, the trustees
22 appointed by the Plaintiffs' Steering Committee may petition
23 the Court as may be appropriate for compensation to be
24 disbursed from the Settlement Fund. The trustees shall have
25 no duties except those which are expressly set forth herein.
26 The trustees may confer with counsel in respect of any
27 question relating to their duties or responsibilities
28 hereunder and they shall not be liable for any act done or
29 omitted by them in good faith on advice of such counsel.
30 Each defendant and the plaintiffs whose counsel have

1 executed this Agreement hereby jointly and severally agree
2 to indemnify and hold harmless the trustee appointed by the
3 Plaintiffs' Steering Committee and the trustee appointed by
4 such defendant against all expenses and liabilities incurred
5 (including, without limiting the generality of the
6 foregoing, litigation expenses, judgments and settlement
7 costs) and all advances made by the trustees prior to the
8 resignation of the trustee appointed by such defendant
9 arising from or in connection with the acceptance and
10 administration of this trust, except such as result from
11 their negligence or wilful misconduct. All obligations on
12 the part of each defendant to indemnify shall cease at the
13 time of the resignation of such defendant's trustee in
14 accordance with the terms of paragraph 6. Subsequent to the
15 resignation of all of the trustees appointed by the
16 defendants pursuant to paragraph 6, the plaintiffs whose
17 counsel have signed this Agreement shall indemnify and hold
18 harmless the remaining trustees against all expenses and
19 liabilities incurred (including, without limiting the
20 generality of the foregoing, litigation expenses, judgments
21 and settlement costs) and all advances made by the trustees
22 arising from or in connection with the acceptance and admin-
23 istration of this trust. The trustees shall not be liable
24 or responsible for anything done or omitted to be done by
25 them in good faith, it being understood that their liability
26 hereunder shall be limited solely to negligence or wilful
27 misconduct on their part. Any successor trustee shall be
28 bound by all the provisions of this Agreement upon his
29 acceptance thereof and shall have all of the power and
30 authority as if originally named as trustee herein.

1 6. The trustee appointed by each defendant shall
2 resign his position at the latest of the following dates:

3 A. If the order described in paragraph 11
4 hereof is entered, then thirty (30) days from the date
5 when the right of any person to appeal from such order
6 and judgment has expired; or, if an appeal is taken
7 from such order and judgment, then thirty (30) days
8 from the date when such order and judgment are affirmed
9 and are no longer subject to judicial review; or

10 B. Thirty (30) days after such time as such
11 defendant's rights to withdraw from this Agreement
12 pursuant to paragraph 12 shall expire.

13 7. Subsequent to the resignation of all trustees
14 appointed by defendants in accordance with the terms of
15 paragraph 6 hereof, one or more successor trustees may be
16 appointed solely by the relevant members of the Plaintiffs'
17 Steering Committee.

18 8. Defendants shall pay their portion of the
19 Settlement Amount over to the trustees in such manner as the
20 trustees shall direct upon the effectiveness of this
21 Agreement as provided in paragraph 24 hereof.

22 9. The Settlement Fund shall be held in trust
23 subject to the following conditions, in addition to any
24 other conditions contained in this Agreement:

25 A. The trustees shall act by unanimous
26 action in accordance with the terms of this Agreement.
27 In the event the trustees are unable to agree on any
28 matter relating to the investment, disbursement or
29 administration of the Settlement Fund, any trustee may,
30 upon notice, move the Court for an order as to the

1 proper handling of the Settlement Fund in accordance
2 with the terms of this Agreement.

3 B. The trustees shall invest all or a por-
4 tion of the Settlement Fund in such manner as shall in
5 their judgment generate the highest rate of interest
6 consistent with security, including, but not limited
7 to, prime commercial paper of industrial, utility and
8 national banking corporations (including the parent
9 holding company of such banking corporation), certi-
10 ficates of deposit of national banks, United States
11 Treasury bonds, bills and notes, obligations supported
12 by the full faith and credit of a state or municipal
13 corporation, or similar investments, pending
14 distribution of the Settlement Fund. All income earned
15 on the Settlement Fund shall become a part of the
16 Settlement Fund.

17 C. Except as provided in paragraph 5, sub-
18 paragraphs 9.D, 9.E and 9.F and paragraphs 12 and 13
19 hereof, the trustees shall be without power to
20 authorize the disbursement of any defendant's portion
21 of the Settlement Fund, including income therefrom, or
22 any part thereof, until such time as the trustee
23 appointed by such defendant shall resign in accordance
24 with the terms of paragraph 6 of this Agreement.

25 D. Notwithstanding subparagraph 9.C hereof,
26 the parties agree that the Settlement Fund may be used,
27 upon Court approval, for the payment of the cost of
28 notice of this settlement to the classes herein
29 defined.

30 E. Any and all disbursements from the

1 Settlement Fund shall be made first from income which
2 has been earned on the Settlement Fund and shall be
3 made from the principal amount thereof only after
4 income has been exhausted.

5 F. Defendants shall bear the liability for
6 taxes on the income earned on the Settlement Fund in
7 the respective proportions of their contributions to
8 the Settlement Fund through and including December 31,
9 1976. In order to provide for tax liabilities incurred
10 by any defendant after December 31, 1976 by reason of
11 income subject to Federal Income Tax earned on the
12 Settlement Fund, an amount equal to one-third (1/3) of
13 such defendant's proportionate share of the income
14 earned on the Settlement Fund after December 31, 1976,
15 if any, shall revert to such defendant from said
16 Settlement Fund at the time such defendant's trustee
17 resigns pursuant to paragraph 6 hereof (if such
18 resignation is subsequent to December 31, 1976) and the
19 Settlement Fund shall be reduced accordingly.

20 G. Subsequent to the resignation of all
21 defendants' trustees in accordance with the terms of
22 paragraph 6 herein, disbursements from the Settlement
23 Fund, including such awards as may be made by the Court
24 for counsel fees and costs, may be made, with Court
25 approval, upon application of the trustees.

26 10. As soon as practicable after the execution of
27 this Stipulation and Agreement of Settlement counsel shall
28 lodge this Stipulation and Agreement of Settlement with the
29 Court, together with a proposed order:

30 A. Requiring appropriate notice to be given

1 to class members and plaintiffs in non-class actions.

2 B. Directing a hearing to be held to deter-
3 mine the reasonableness, adequacy and fairness of the
4 proposed settlement and whether it should be approved
5 by the Court.

6 C. Providing that any class member or other
7 appropriate person who objects to the approval of this
8 Agreement or to the judgment to be entered hereon may
9 appear at the hearing and show cause why the settlement
10 proposed herein should not be approved as fair, reason-
11 able and adequate and why a judgment should not be
12 entered hereon.

13 D. Requiring that the objection of any such
14 person must be made in writing and that such objection
15 together with any supporting papers must be filed with
16 the Court within such time prior to the hearing as the
17 Court may direct.

18 E. Reserving jurisdiction over the effec-
19 tuation of the settlement provided for herein for all
20 purposes and resolving any disputes that may arise.

21 F. Providing that all plaintiff class
22 members who do not file a request for exclusion within
23 such time as the Court may direct shall be barred from
24 prosecuting any claims against defendants or the C and
25 H members which were alleged or could have been alleged
26 in these actions up to the date of this Agreement
27 pertaining to refined sugar purchased in the markets
28 and based on or related to any federal or state
29 antitrust law, or which are based on or related to any
30 facts, matters or claims which were alleged or could

1 have been alleged in said actions up to the date of
2 this Agreement pertaining to refined sugar purchased in
3 the markets and based on or related to any federal or
4 state antitrust law.

5 G. Requiring all plaintiffs in non-class
6 actions, including plaintiffs in purported class
7 actions who have not been designated as class
8 representatives, who do not choose to participate in
9 the settlement to file an appropriate written notice
10 with the Court within such time prior to the hearing
11 referred to in subparagraph 10.B hereof as the Court
12 may direct and providing that all plaintiffs in non-
13 class actions who do not timely file such notice shall
14 be barred from prosecuting any claims which were
15 alleged or could have been alleged in these actions up
16 to the date of this Agreement pertaining to refined
17 sugar purchased in the markets and based on or related
18 to any federal or state antitrust law or which are
19 based on or related to any facts, matters or claims
20 which were alleged or could have been alleged in said
21 actions up to the date of this Agreement pertaining to
22 refined sugar purchased in the markets and based on or
23 related to any federal or state antitrust law.

24 11. Following final approval by the Court of the
25 settlement, counsel jointly shall file a motion for an
26 Order, which shall constitute an immediate and separate
27 final judgment pursuant to F.R.C.P., Rule 54(b):

28 A. Dismissing on the merits and with-
29 prejudice the complaints as to defendants and each of
30 the C and H members in all these actions wherein the

1 named plaintiffs have not requested exclusion from the
2 settlement in accordance with subparagraphs 10.F and
3 10.G, except that the dismissals shall be without
4 prejudice as to any claims for recovery for purchases
5 of refined sugar outside the markets.

6 B. Barring all plaintiffs and class members
7 who did not timely file a request for exclusion in
8 accordance with subparagraphs 10.F and 10.G from
9 prosecuting any claims against defendants or the C and
10 H members which were alleged or could have been alleged
11 in these actions up to the date of this Agreement
12 pertaining to refined sugar purchased in the markets
13 and based on or related to any federal or state anti-
14 trust law or which are based on or related to any
15 facts, matters or claims which were alleged or could
16 have been alleged in said actions up to the date of
17 this Agreement pertaining to refined sugar purchased in
18 the markets and based on or related to any federal or
19 state antitrust law and requiring each named plaintiff
20 who did not timely file a request for exclusion in
21 accordance with subparagraph 10.G to execute and
22 deliver its covenant not to sue defendants or the C and
23 H members with respect to claims barred by the Order
24 provided for in this subparagraph B, which covenant
25 shall be conformable to the provisions of paragraph 17
26 hereof and shall be delivered before any distribution
27 from the Settlement Fund to such plaintiff.

28 12. The parties shall have the right to withdraw
29 from this Agreement in the following instances:

30 A. Should the Court modify its Class

1 Certification Order so as to certify classes which are
2 narrower than the classes defined in Appendix B, prior
3 to the entry of judgment dismissing defendants and the
4 C and H members from these actions, each defendant
5 shall have the right to withdraw from this Agreement
6 within thirty (30) days after such action by the Court.

7 B. Within thirty (30) days after the Court
8 has issued its ruling on all motions directed to the
9 Court's Class Certification Order of May 20, 1976, each
10 defendant shall have the right to withdraw from this
11 Agreement unless the Court (a) modifies Class 14 in
12 said Order to exclude all purchases of refined sugar
13 from Class 14 and to confine Class 14 to purchases of
14 molasses for agricultural purposes, and (b) modifies
15 Class 15 in said Order to include all persons or
16 entities which directly or indirectly purchased refined
17 sugar as wholesalers for resale as sugar in either the
18 original package or repackaged, as set forth in Class
19 Four in Appendix B hereto.

20 C. Within fifteen (15) business days after
21 the deadline set by the Court for class members to
22 exclude themselves from the classes for the purposes of
23 this settlement or for non-class plaintiffs to exclude
24 themselves from the settlement (paragraphs 10.F and
25 10.G hereof), each defendant shall have the right to
26 withdraw from the Agreement if in such defendant's sole
27 judgment the exclusions are significant. If additional
28 actions, beyond those identified in Appendix A, should
29 be filed against any defendant or the C and H members
30 in which the named plaintiffs or any class members

1 allegedly represented are within the plaintiff classes
2 described in Appendix B hereof, but are not barred by
3 the opt-out provisions (paragraphs 10.F and 10.G
4 hereof), defendants may regard those as exclusions.

5 D. If any party withdraws from this
6 Agreement pursuant to the terms of this paragraph 12:

7 (i) This Agreement shall be null and
8 void as to said withdrawing party;

9 (ii) This Agreement shall have no
10 further force and effect as to the withdrawing
11 party, and this Agreement and any and all
12 negotiations and proceeding relating thereto shall
13 be without prejudice to the rights and contentions
14 of the withdrawing party in any action and all the
15 parties hereto will move the Court to vacate any
16 orders entered pursuant to this Agreement that are
17 inconsistent with restoration of such status quo
18 and as to the withdrawing party;

19 (iii) Notwithstanding paragraphs 4
20 through 9 herein, that portion of the Settlement
21 Fund contributed by said defendant, plus interest
22 and less authorized disbursements including,
23 without limiting the generality thereof, costs of
24 notice previously advanced, shall upon demand be
25 returned to said defendant; and

26 (iv) This Agreement shall remain in full
27 force and effect as to all non-withdrawing parties
28 and any such withdrawal shall not in any way
29 effect the rights and obligations of non-
30 withdrawing parties.

1 E. The exercise by any party of any rights
2 to withdraw from this Agreement shall be accomplished
3 by service of written notice of withdrawal on the
4 trustees of the Settlement Fund via registered mail.

5 13. In the event that for any reason this Agree-
6 ment shall be disapproved by the Court, or approved but
7 reversed on appeal, or should any of the orders of the Court
8 contemplated by paragraphs 10 and 11 hereof not be made, or
9 made but reversed on appeal.

10 A. This Agreement shall be null and void;

11 B. Notwithstanding paragraphs 4 through 9
12 herein, that portion of the Settlement Fund contributed
13 by each defendant, plus interest and less authorized
14 disbursements, including, without limiting the
15 generality thereof, costs of notice previously
16 advanced, shall upon demand be returned to such
17 defendant; and

18 C. This Agreement shall have no further
19 force and effect, and this Agreement and any and all
20 negotiations and proceedings relating thereto shall be
21 without prejudice to the rights and contentions of
22 defendants or plaintiffs or any class members herein or
23 in any other action and all the parties hereto will
24 move the Court to vacate any orders entered pursuant to
25 this Agreement that are inconsistent with restoration
26 of such status quo ante.

27 14. In the event that this Agreement becomes void
28 pursuant to paragraph 13 and disbursements have been made
29 from the Settlement Fund, such disbursements shall be
30 apportioned among the parties as follows:

1 A. C and H shall bear its proportionate
2 share (69%) of any such disbursements.

3 B. Holly shall bear one-half of its
4 proportionate share, or 10.5%, of any such
5 disbursements and the remaining 10.5% shall be borne by
6 C and H.

7 C. Union shall bear one-half of its
8 proportionate share, or 5%, of any such disbursements
9 and the remaining 5% shall be borne by C and H.

10 15. In the event that any defendant withdraws
11 from this Agreement pursuant to paragraph 12 and
12 disbursements have been made from the Settlement Fund, said
13 withdrawing defendant shall bear its full proportionate
14 share of such disbursements.

15 16. Neither this Agreement nor any proceedings
16 hereunder shall in any event be construed as or deemed to
17 be, evidence of any admission, on the part of plaintiffs, of
18 lack of merit in these actions or, on the part of
19 defendants, the C and H members, or any of their agents,
20 attorneys, employees, officers or directors, an admission of
21 any liability or wrongdoing whatsoever, or of the truth of
22 the allegations of the complaints, or the propriety of the
23 classes certified by the Court or of lack of merit in any of
24 defendants' counterclaims or defenses, nor shall this
25 Agreement, or any of the terms hereof, or any of the
26 negotiations or proceedings connected herewith, be offered
27 or received in evidence for any purpose other than for
28 purposes of these settlement and dismissal proceedings, and,
29 without limitation, they shall not be used as an admission
30 of any wrongful or illegal activity on the part of any

1 defendant, the C and H members, or any of their present or
2 former agents, attorneys, employees, officers, directors or
3 partners, of any liability whatsoever by any of them, or as
4 an admission of any of the allegations contained in the
5 complaints in these actions. Neither this Agreement nor
6 participation in any proceeding hereunder shall be deemed to
7 be or to constitute a waiver by any defendant of any defense
8 or counterclaim which it may have in these actions.

9 17. Neither this Agreement nor any document exe-
10 cuted pursuant hereto shall be construed as a release except
11 that it shall be construed to be a covenant not to sue
12 defendants, or the C and H members on any claim or cause of
13 action alleged or which could have been alleged in these
14 actions up to the date of this Agreement pertaining to
15 refined sugar purchased in the markets and based on or
16 related to any federal or state antitrust law, and the
17 plaintiffs and the classes they represent reserve the right
18 to proceed against or sue any person, firm or corporation
19 other than defendants, the C and H members and their present
20 and former officers, directors, employees and agents with
21 respect to all claims or causes of action asserted in these
22 actions, including without limitation claims based on
23 purchases of refined sugar from defendants.

24 18. Neither this Agreement nor any document exe-
25 cuted pursuant hereto shall be construed as a release of
26 anyone other than (a) the settling claimants and (b) their
27 present and former officers, directors, employees and agents
28 from any claim or cause of action, and defendants reserve
29 the right to proceed against or sue any person, firm or
30 corporation not within the group above described with

1 respect to all claims or causes of action asserted or which
2 may be asserted in defendants' counterclaims in these
3 actions.

4 19. As a part of the consideration for this
5 Agreement by Union, it is agreed and understood that neither
6 the Union Sugar Division nor any other division, subsidiary
7 or affiliate of Consolidated Foods Corporation shall be
8 entitled to participate as a class member in the
9 consolidated actions nor shall any of such persons hereafter
10 commence an action for damages under any federal or state
11 antitrust law based upon the claims now asserted in the
12 consolidated actions against any party which is now named as
13 a defendant therein. Except as thus expressly provided in
14 this paragraph, said persons expressly reserve the right to
15 bring or maintain any claim or cause of action of any kind
16 or character whatever and against any person whatever.

17 20. Defendants and the named plaintiffs who join
18 in this settlement hereby agree that their records and per-
19 sonnel will remain available to each other for discovery and
20 trial in the event that this settlement is consummated as if
21 they were still named parties in these actions.

22 21. Upon dismissal with prejudice of defendants
23 and the C and H members from these actions, defendants agree
24 simultaneously to dismiss with prejudice each and every
25 counterclaim against the settling claimants, which they have
26 heretofore asserted in any and all of these actions
27 pertaining to refined sugar purchased in the markets and
28 based on or related to any federal or state antitrust law.

29 22. At any time during the course of this liti-
30 gation, if all of the plaintiffs in the action 1012

1 Distributing Corporation, et al. v. Utah Idaho Sugar Co., et
2 al., Case No. C75-1731 GHB shall have accepted this
3 Agreement and the settlement herein contemplated, C and H
4 agrees, upon written demand by all of said plaintiffs, to
5 enter into an agreement with them as set forth in Appendix C
6 hereto.

7 23. At such time as any funds are distributed
8 from the Settlement Fund to any settling claimants, the
9 parties agree that, unless the defendants agree to some
10 other device, the disbursement agent for such funds shall
11 require that each check drawn on the Settlement Fund shall
12 contain an endorsement to be executed by the settling
13 claimant prior to negotiation of the check stating that, by
14 accepting such payment, the settling claimant acknowledges
15 that the payment is in complete and final satisfaction of
16 all claims against Holly, Union, C and H, and each of the C
17 and H members identified above, and their present and former
18 officers, directors, employees, partners and agents, which
19 claims were alleged or could have been alleged in these
20 actions up to the date of this Agreement pertaining to
21 refined sugar purchased in the markets and based on or
22 related to any federal or state antitrust law, or which are
23 based on or related to any facts, matters, or claims which
24 were alleged or could have been alleged in these actions.

25 24. This Agreement may be executed in counter-
26 parts by the parties hereto, each of which shall be deemed
27 an original and which together shall constitute one and the
28 same instrument, and will become effective upon its execu-
29 tion by Rayner H. Hamilton, Esq. on behalf of Holly, by
30 Bailey Lang, Esq. on behalf of C and H, and by Stephen V.

1 Bonse, Esq. on behalf of Union and its execution by:

2 (1) a majority of the relevant members of the
3 Plaintiffs' Steering Committee (A member of the
4 Plaintiffs' Steering Committee shall be deemed
5 "relevant" if he represents a plaintiff eligible to
6 participate in this settlement); and

7 (2) a majority of the attorneys for the class
8 representatives designated by the Court, in (a) as to
9 Classes One, Two and Three, a majority of the cases of
10 each of the functional subclasses aggregated together
11 for the three geographic classes and (b) as to Class
12 Four, a majority of the cases. If several attorneys
13 are designated for a single class representative they
14 shall be counted collectively only as one in
15 determining whether the required majority has been
16 achieved. An attorney representing more than one class
17 representative in Class Four shall be counted only once
18 in determining whether a majority has been achieved in
19 that class. An attorney representing more than one
20 class representative in the same functional subclass
21 (aggregated throughout the three geographical classes)
22 shall be counted only once in determining whether a
23 majority has been achieved for that aggregated
24 subclass.

25 25. If this Stipulation and Agreement becomes
26 effective pursuant to paragraph 24 hereof and if thereafter,
27 by reason of changes in the number or identity of the class
28 representatives, less than the required number of attorneys
29 for class representatives are signatory hereto, any
30 defendant may withdraw from this Stipulation and Agreement

Dated:

FOR MOLLY:

FOR THE PLAINTIFFS' STEERING COMMITTEE

Rayner M. Hamilton
Rayner M. Hamilton

FOR UNION:

Stephen V. Bonse

FOR C AND H:

Bailey Lang
Bailey Lang

FOR THE PLAINTIFFS

[illegible]

1 FOR THE PLAINTIFFS
2 James H. Hamilton
3 on behalf of plaintiff(s) on behalf of plaintiff(s)
4 C75 1606 GHB; C75 1674 GHB
5
6
7 on behalf of plaintiff(s) on behalf of plaintiff(s)
8
9
10
11 on behalf of plaintiff(s) on behalf of plaintiff(s)
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15 on behalf of plaintiff(s) on behalf of plaintiff(s)
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19 on behalf of plaintiff(s) on behalf of plaintiff(s)
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23 on behalf of plaintiff(s) on behalf of plaintiff(s)
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25
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27 on behalf of plaintiff(s) on behalf of plaintiff(s)
28
29
30

1 by written notice given to the Trustees within thirty (30)
2 days of such changes unless, within thirty (30) days after
3 such notice, the requisite number of additional attorneys
4 for class representatives sign this Stipulation and
5 Agreement.
6 Dated:
7 FOR HOLLY: FOR THE PLAINTIFFS' STEERING COMMITTEE
8
9 Rayner H. Hamilton
10
11 FOR UNION:
12
13 Stephen V. Bonse
14
15 FOR C AND H:
16 Bailey Lang
17
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FOR THE PLAINTIFFS

1 James A. Old _____
 2 on behalf of plaintiff(s) on behalf of plaintiff(s)
 3 Donald R. Cornett et al _____
 4 Center et al _____
 5 Thompson & Co. _____
 6 on behalf of plaintiff(s) on behalf of plaintiff(s)
 7 Douglas B. Baker et al _____
 8 Arthur E. Baker _____
 9 on behalf of plaintiff(s) on behalf of plaintiff(s)
 10 D. H. Baker _____
 11 on behalf of plaintiff(s) on behalf of plaintiff(s)
 12 SCANDIA BAKERY _____
 13 _____
 14 _____
 15 on behalf of plaintiff(s) on behalf of plaintiff(s)
 16 _____
 17 _____
 18 _____
 19 on behalf of plaintiff(s) on behalf of plaintiff(s)
 20 _____
 21 _____
 22 _____
 23 on behalf of plaintiff(s) on behalf of plaintiff(s)
 24 _____
 25 _____
 26 _____
 27 on behalf of plaintiff(s) on behalf of plaintiff(s)
 28 _____
 29 _____
 30 _____

1 for class representatives sign this Stipulation and
 2 Agreement.

3 Dated:

4 FOR HOLLY:

6 Kayner E. Hamilton

8 FOR UNION:

10 Stephen V. House

12 FOR C AND H:

14 Bailey Lang

FOR THE PLAINTIFFS' STEERING COMMITTEE

Perry G. Kelley
James A. Old
Donald R. Cornett
Thompson & Co.
Douglas B. Baker
Arthur E. Baker

27 speaks & signing for FOR THE PLAINTIFFS

27 by Perry G. Kelley Lawrence Walner
 28 on behalf of plaintiff(s) on behalf of plaintiff(s)
 29 Sugarco Beverage Co. et al. Genacis Group, Inc.
 30

1	<u>James H. Lash</u>	<u>Robert A. Minnick</u>
2	on behalf of plaintiff(s)	on behalf of plaintiff(s)
3	<u>Heinemann, Inc.</u>	<u>Robert J. Pizzarello (as TCH Inc.)</u>
4	<u>Edward O. Zeman</u>	<u>Hubert Donat Shop Inc.</u>
5		
6	on behalf of plaintiff(s)	on behalf of plaintiff(s)
7	<u>HERCHARTS REST. INC. & COMPANY</u>	<u>Baldy Candy Co.</u>
8		
9	<u>Michael J. Tied</u>	<u>Paul Schreff</u>
10	on behalf of plaintiff(s)	on behalf of plaintiff(s)
11	<u>PLANTING GREEN COMPANY, INC.</u>	<u>Great Mill</u>
12		
13	<u>Robert J. Cullen</u>	<u>James B. Shaw</u>
14	on behalf of plaintiff(s)	on behalf of plaintiff(s)
15	<u>Thomas T. Leland Foods</u>	<u>Silkman Brothers Inc.</u>
16		<u>McClary Industries Inc.</u>
17	<u>Sheldon O'Collen</u>	<u>John E. Busch</u>
18	on behalf of plaintiff(s)	on behalf of plaintiff(s)
19	<u>CFS COAT. INC. CFS-PA, INC.</u>	<u>PASSENGERS RESTAURANTS</u>
20	<u>et al and Harold Ernest Boly</u>	<u>MILKESD CONFECTION CO.</u>
21		<u>SCHULZE AND BURCH BISCUIT CO.</u>
22	on behalf of plaintiff(s)	on behalf of plaintiff(s)
23		
24		
25		
26	on behalf of plaintiff(s)	on behalf of plaintiff(s)
27		
28		
29		
30		

1	FOR THE PLAINTIFFS	
2		<u>John H. Boone</u>
3	on behalf of plaintiff(s)	on behalf of plaintiff(s)
4		<u>Robert A. L.</u>
5		
6		
7	on behalf of plaintiff(s)	on behalf of plaintiff(s)
8		
9		
10		
11	on behalf of plaintiff(s)	on behalf of plaintiff(s)
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14		
15	on behalf of plaintiff(s)	on behalf of plaintiff(s)
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19	on behalf of plaintiff(s)	on behalf of plaintiff(s)
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22		
23	on behalf of plaintiff(s)	on behalf of plaintiff(s)
24		
25		
26		
27	on behalf of plaintiff(s)	on behalf of plaintiff(s)
28		
29		
30		

1 for class representatives sign this Stipulation and
2 Agreement.

3 Dated:

4 FOR HOLLY:

FOR THE PLAINTIFFS' STEERING COMMITTEE

6 _____
7 Kayner E. Hamilton

Joseph L. Aliste

8 FOR UNION:

10 _____
11 Stephen V. Bonse

12 FOR C AND H:

13 _____
14 Bailey Lang

27 FOR THE PLAINTIFFS

28 _____
29 on behalf of plaintiff(s)

30 *Alakey, Inc; Bell Air Mart*

27 *Joseph L. Aliste*
28 _____
29 on behalf of plaintiff(s)

30 *Sam Gordon Corp; Kohl's*

1 for class representatives sign this Stipulation and
2 Agreement.

3 Dated:

4 FOR HOLLY:

FOR THE PLAINTIFFS' STEERING COMMITTEE

6 _____
7 Kayner E. Hamilton

Leon H. Foyen
Albert R. Melara

8 FOR UNION:

10 _____
11 Stephen V. Bonse

12 FOR C AND H:

13 _____
14 Bailey Lang

27 FOR THE PLAINTIFFS

28 *Leon H. Foyen*
29 _____

30 on behalf of plaintiff(s)

Albert R. Melara

1812 Des Moines Corp et al

on behalf of plaintiff(s)

Washington Beverages et al

1 by written notice given to the Trustees within thirty (30)
2 days of such changes unless, within thirty (30) days after
3 such notice, the requisite number of additional attorneys
4 for class representatives sign this Stipulation and
5 Agreement.

6 Dated:

7 FOR HOLLY:

8 _____
9 Rayner M. Hamilton
10

11 FOR UNION:

12 _____
13 Stephen V. Donse
14

15 FOR C AND H:

16 _____
17 Bailey Lang
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FOR THE PLAINTIFFS' STEERING COMMITTEE

J. Nathan

FOR THE PLAINTIFFS

3 on behalf of plaintiff(s)

on behalf of plaintiff(s)

7 on behalf of plaintiff(s)

on behalf of plaintiff(s)

E. O. Nelson

11 on behalf of plaintiff(s)

on behalf of plaintiff(s)

15 on behalf of plaintiff(s)

on behalf of plaintiff(s)

19 on behalf of plaintiff(s)

on behalf of plaintiff(s)

23 on behalf of plaintiff(s)

on behalf of plaintiff(s)

27 on behalf of plaintiff(s)

on behalf of plaintiff(s)

1 Rayner H. Hamilton FOR THE PLAINTIFFS
2
3 on behalf of plaintiff(s) on behalf of plaintiff(s)
4 Fantasia Confections, Inc.
5 Zim's Restaurants, Inc.
6
7 on behalf of plaintiff(s) on behalf of plaintiff(s)
8
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11 on behalf of plaintiff(s) on behalf of plaintiff(s)
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15 on behalf of plaintiff(s) on behalf of plaintiff(s)
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19 on behalf of plaintiff(s) on behalf of plaintiff(s)
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23 on behalf of plaintiff(s) on behalf of plaintiff(s)
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27 on behalf of plaintiff(s) on behalf of plaintiff(s)
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1 by written notice given to the Trustees within thirty (30)
2 days of such changes unless, within thirty (30) days after
3 such notice, the requisite number of additional attorneys
4 for class representatives sign this Stipulation and
5 Agreement.
6 Dated:
7 FOR HOLLY: FOR THE PLAINTIFFS' STEERING COMMITTEE
8 Rayner H. Hamilton
9
10
11 FOR UNION:
12
13 Stephen V. Bonse
14
15 FOR C AND H:
16
17 Bailey Long
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1	FOR THE PLAINTIFFS	
2	<u>Wayne H. Harker</u>	_____
3	on behalf of plaintiff(s)	on behalf of plaintiff(s)
4	<u>Mid-America Dairymen, Inc.</u>	_____
5		
6	<u>Price Candy Company</u>	_____
7	on behalf of plaintiff(s)	on behalf of plaintiff(s)
8	_____	_____
9		
10	_____	_____
11	on behalf of plaintiff(s)	on behalf of plaintiff(s)
12	_____	_____
13		
14	_____	_____
15	on behalf of plaintiff(s)	on behalf of plaintiff(s)
16	_____	_____
17		
18	_____	_____
19	on behalf of plaintiff(s)	on behalf of plaintiff(s)
20	_____	_____
21		
22	_____	_____
23	on behalf of plaintiff(s)	on behalf of plaintiff(s)
24	_____	_____
25		
26	_____	_____
27	on behalf of plaintiff(s)	on behalf of plaintiff(s)
28	_____	_____
29		
30		

1	FOR THE PLAINTIFFS	
2	<u>Arthur J. Williams</u>	_____
3	on behalf of plaintiff(s):	on behalf of plaintiff(s)
4	<u>(1) Owens Enterprises, Inc, et al.</u>	_____
5		
6	<u>(2) John's Ford Centers</u>	_____
7	on behalf of plaintiff(s)	on behalf of plaintiff(s)
8	_____	_____
9		
10	<u>Jeff D. Brown</u>	_____
11	on behalf of plaintiff(s)	on behalf of plaintiff(s)
12	<u>Bleu's Candy</u>	_____
13		
14	<u>Village</u>	_____
15	on behalf of plaintiff(s)	on behalf of plaintiff(s)
16	_____	_____
17		
18	_____	_____
19	on behalf of plaintiff(s)	on behalf of plaintiff(s)
20	_____	_____
21		
22	_____	_____
23	on behalf of plaintiff(s)	on behalf of plaintiff(s)
24	_____	_____
25		
26	_____	_____
27	on behalf of plaintiff(s)	on behalf of plaintiff(s)
28	_____	_____
29		
30		

Arthur Gochman

R. C. Arroyo

1	Arthur Gochman	Richard C. Arroyo
2	on behalf of plaintiff(s)	on behalf of plaintiff(s)
3	In C76 0701 GHB	In 76-B-95 (S.D. Texas)
4	Ramiro Martinez, et al.	M. A. Lopez Supermarket, Inc.
5	-----	-----
6	on behalf of plaintiff(s)	on behalf of plaintiff(s)
7	-----	-----
8	-----	-----
9	-----	-----
10	on behalf of plaintiff(s)	on behalf of plaintiff(s)
11	-----	-----
12	-----	-----
13	-----	-----
14	on behalf of plaintiff(s)	on behalf of plaintiff(s)
15	-----	-----
16	-----	-----
17	-----	-----
18	on behalf of plaintiff(s)	on behalf of plaintiff(s)
19	-----	-----
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John Anderson, Jr.

FOR THE PLAINTIFFS

2	John Anderson, Jr.	-----
3	on behalf of plaintiff(s)	on behalf of plaintiff(s)
4	Zarda Brothers Dairy, Inc.	-----
5	The Page Milk Company	-----
6	-----	-----
7	on behalf of plaintiff(s)	on behalf of plaintiff(s)
8	-----	-----
9	-----	-----
10	-----	-----
11	on behalf of plaintiff(s)	on behalf of plaintiff(s)
12	-----	-----
13	-----	-----
14	-----	-----
15	on behalf of plaintiff(s)	on behalf of plaintiff(s)
16	-----	-----
17	-----	-----
18	-----	-----
19	on behalf of plaintiff(s)	on behalf of plaintiff(s)
20	-----	-----
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22	-----	-----
23	on behalf of plaintiff(s)	on behalf of plaintiff(s)
24	-----	-----
25	-----	-----
26	-----	-----
27	on behalf of plaintiff(s)	on behalf of plaintiff(s)
28	-----	-----
29	-----	-----
30	-----	-----

1 *Kenton C. Granger*
2 Kenton C. Granger
3 on behalf of plaintiff(s) on behalf of plaintiff(s)
4 Missouri Farmers Association, Inc.
5 M.F.A. Milling Company
6
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8
9
10 on behalf of plaintiff(s) on behalf of plaintiff(s)
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14 on behalf of plaintiff(s) on behalf of plaintiff(s)
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18 on behalf of plaintiff(s) on behalf of plaintiff(s)
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1 APPENDIX A
2 C74 2687 GHB - SUN GARDEN PACKING COMPANY
3 C74 2689 GHB - ENG-SKELL COMPANY
4 C74 2695 GHB - ZIN'S RESTAURANTS, INC.
5 C74 2698 GHB - ZIN'S RESTAURANTS, INC.
6 C74 2711 GHB - PAOLI'S RESTAURANTS, INC.
7 C74 2727 GHB - FANTASIA CONFECTIONS, INC.
8 C74 2728 GHB - FANTASIA CONFECTIONS, INC.
9 C75 0041 GHB - RALEY'S, INC.
10 C75 0117 GHB - BLUM'S OF SAN FRANCISCO
11 C75 0504 GHB - FOOD MART-EUREKA
12 C75 0505 GHB - OWENS ENTERPRISES, INC.
13 C75 1120 GHB - GENESIS GROUP, INC.
14 C75 1121 GHB - SUPERIOR BEVERAGE COMPANY, INC.
15 C75 1122 GHB - BALDI CANDY COMPANY
16 C75 1123 GHB - HEINERHANN'S, INC.
17 C75 1125 GHB - PLANTATION BAKING COMPANY, INC.
18 C75 1126 GHB - ZION INDUSTRIES, INC.
19 C75 1127 GHB - TREASURY ISLAND FOODS, INC.
20 C75 1128 GHB - HOME JUICE COMPANY
21 C75 1130 GHB - WASHINGTON BEVERAGES, INC.
22 C75 1131 GHB - SEECO, INC.
23 C75 1404 GHB - MOTHER'S CAKE & COOKIE CO.
24 C75 1424 GHB - SCANDIA BAKERY
25 C75 1454 GHB - NORTHWEST CANDY, INC.
26 C75 1455 GHB - EWALD BROS., INC.
27 C75 1543 GHB - ITT CONTINENTAL BAKING COMPANY
28 C75 1544 GHB - ITT CONTINENTAL BAKING COMPANY
29 C75 1545 GHB - KING KELLY MARSHALADE COMPANY
30 C75 1546 GHB - GENERAL BOTTLERS, INC.

1 C75 1553 GHB - MERCHANTS RESTAURANT, INC.
 2 C75 1554 GHB - SCHULZE AND BURCH BISCUIT CO.
 3 C75 1555 GHB - CRIST HILL CO.
 4 C75 1606 GHB - THE BROTHERS RESTAURANTS, INC.
 5 C75 1674 GHB - STEAK-O-RAMA
 6 C75 1696 GHB - ZARDA BROTHERS DAIRY
 7 C75 1730 GHB - SMITH COOKIE COMPANY
 8 C75 1731 GHB - 1812 DISTRIBUTING CORPORATION
 9 C75 1756 GHB - UNITED A.G. COOPERATIVE
 10 C75 1808 GHB - MISSOURI FARMERS ASSOCIATION
 11 C75 1824 GHB - JOHN'S FOOD CENTERS
 12 C75 1908 GHB - BRESLER ICE CREAM
 13 C75 1909 GHB - INTERNATIONAL INDUSTRIES
 14 C75 1910 GHB - INTERNATIONAL INDUSTRIES
 15 C75 1911 GHB - INTERNATIONAL INDUSTRIES
 16 C75 1912 GHB - ORANGE JULIUS OF AMERICA
 17 C75 1957 GHB - BENNER TEA COMPANY
 18 C75 1973 GHB - THE PANIPLUS CO.
 19 C75 2024 GHB - PASSENGERS RESTAURANTS
 20 C75 2025 GHB - MILFORD CANNING CO.
 21 C75 2026 GHB - TRI-R BENDING SERVICE
 22 C75 2027 GHB - SETHNESS GREENLEAF INC.
 23 C75 2190 GHB - HAROLD FREUND BAKING CO.
 24 C75 2191 GHB - CFS CONTINENTAL - LOS ANGELES, INC.
 25 C75 2247 GHB - COURTESY FOOD MART, INC.
 26 C75 2457 GHB - SCHWAN'S SALES ENTERPRISES, INC.
 27 C75 2495 GHB - AMERICAN BAKERIES COMPANY
 28 C75 2561 GHB - ARMAND'S, INC.
 29 C75 2563 GHB - INTERNATIONAL KINGS TABLE, INC.
 30 C75 2564 GHB - INTERNATIONAL KINGS TABLE, INC.

1 C75 2593 GHB - THE DICKINSON FAMILY, INC.
 2 C75 2605 GHB - CFS CONTINENTAL - LOS ANGELES, INC.
 3 C75 2619 GHB - NORTHWEST PACKING CO.
 4 C76 0014 GHB - E.O. HUDSON
 5 C76 0065 GHB - IMPERIAL PRESERVES, INC.
 6 C76 0113 GHB - GOELITZ CONFECTIONARY COMPANY
 7 C76 0280 GHB - INTERSTATE BRANDS CORPORATION
 8 C76 0288 GHB - INTERSTATE BRANDS CORPORATION
 9 C76 0544 GHB - DI GIORGIO CORPORATION
 10 C76 0701 GHB - RAMIRO MARTINEZ
 11 C76 0702 GHB - PEPSI COLA - BOTTLING CO. OF TOPEKA, INC.
 12 C76 1082 GHB - MID-AMERICA DAIRYMEN, INC.
 13 76-B-95 - (S.D. Texas) M.A. LOPEZ SUPERMARKET, INC.

APPENDIX B

I. Class_One

A. Subclass_One -- consisting of all industrial sugar users 1* in the Chicago-West Territory 2* who have purchased refined sugar 3* in this area during the period from 1955 to the present;

B. Subclass_Two -- consisting of all retail grocers in the Chicago-West Territory who have purchased refined sugar in this area during the period from 1955 to the present;

II. Class_Two

A. Subclass_One -- consisting of all industrial sugar users in the California-Arizona Territory 4*

1* Concerning the industrial sugar users for this and the following classes, such entities must have purchased refined sugar for use or incorporation in producing, manufacturing or processing foodstuffs, including beverages, for human or animal consumption, and must not have offered such sugar for resale as sugar. Restaurants included within this class shall be limited to those restaurants that are or were, during the relevant time, (a) members of the National Restaurant Association, the Foodservice and Lodging Institute, or their local affiliated organizations, or (b) franchisees or franchisors that are or were engaged in the business of franchising restaurants in one of the three sugar areas as it pertains to these respective classes. Hospitals and health care institutions included within this class shall be limited to those identified in the American Hospital Association's annual directory, "Guide to the Health Care Field" or members of the Federation of American Hospitals.

2* The "Chicago-West Territory" consists of the states of Indiana, Illinois, Iowa, Minnesota, Wisconsin, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Montana, Missouri, New Mexico, Oklahoma, Texas and Wyoming (east of the town of Rawlins).

3* "Refined sugar" means any grade, type or form of saccharine product derived from the processing of sugar beets or in the refining of raw cane sugar, which contains sucrose, dextrose or levulose excepting molasses used for the manufacturing, compounding, formulating or mixing of animal feed and other agricultural products. "Molasses" means any grade or type of saccharine product derived from sugar cane or sugar beets which is principally not of crystalline structure, and which contains soluble non-sugar solids (excluding any foreign substances which may have been added or developed in the product) in excess of 6% of the total soluble solids, including "blackstrap molasses", "refinery molasses" and "beet molasses", but excluding "liquid sugars."

4* The "California-Arizona Territory" consists of the

who have purchased refined sugar in this area during the period from 1949 to the present;

B. Subclass_Two -- consisting of all retail grocers in the California-Arizona Territory who have purchased refined sugar in this area during the period from 1949 to the present;

III. Class_Three

A. Subclass_One -- consisting of all industrial sugar users in the Intermountain-Northwest Territory 5* who have purchased refined sugar in this area during the period from 1949 to the present;

B. Subclass_Two -- consisting of all retail grocers in the Intermountain-Northwest Territory who have purchased refined sugar in this area during the period from 1949 to the present;

IV. Class_Four -- consisting of all persons or entities in the Chicago-West Territory, in the California-Arizona Territory and in the Intermountain-Northwest Territory who directly or indirectly purchased refined sugar as wholesalers during the period from 1949 to the present for resale as sugar in either the original package or repackaged. 6*

Continued

states of California and Arizona, and the cities of Las Vegas and Reno, Nevada.

5* The "Intermountain-Northwest Territory" consists of the states of Washington, Oregon, Utah, Idaho and Wyoming (west of the town of Rawlins).

6* Excluded from these four classes are (a) the defendants, their subsidiaries and affiliated business entities, and (b) each plaintiff who has instituted and presently maintains a non-class action.

APPENDIX C

It is mutually understood that some of the plaintiffs in the actions coordinated in the United States District Court for the Northern District of California under Docket No. HDL 201 seek injunctive relief in connection with sales of refined sugar in the Intermountain-Northwest territory, as defined in that litigation, to require in substance that the defendants in those actions who sell refined sugar in that market:

(a) refrain from the use of any pricing system involving a "basing point" or "basing points" other than the point of manufacture of such sugar, if use of such "basing point" pricing system has the effect of requiring purchasers of refined sugar in the Intermountain-Northwest territory to pay transportation or freight application charges from a "basing point", other than the point of manufacture, in an amount greater than the actual cost of freight from the point of manufacture; and/or

(b) offer to sell refined sugar to purchasers in the Intermountain-Northwest territory on the basis of F.O.B. plant of manufacture, allowing the purchaser to arrange its own transportation; and/or

(c) charge purchasers of refined sugar in the Intermountain-Northwest territory no more for freight or freight application charges than the actual freight cost incurred by such defendants in shipping sugar from the point of manufacture to the purchaser thereof.

Although C and H does not, and has not within any time material to this litigation, sold any significant

amount of refined sugar in the Intermountain-Northwest territory under any "basing point" pricing system such as that which plaintiffs seek to eliminate, nevertheless, C and H agrees that if, during the course of this litigation, such an injunction should be issued by consent or otherwise in one of the actions coordinated under HDL 201, namely that action entitled 1812 Distributing Company et al., v. Utah-Idaho Company et al., No. C75-1731 GHB, U.S.D.C., N.D.Cal., against one or more defendants in those actions (other than C and H) who, in the aggregate, supply at least twenty-five percent (25%) of all refined sugar sold in the Intermountain-Northwest territory, C and H will consent that a decree be entered against it in said action (even though it may theretofore have been dismissed from such action), on similar terms subject to the understanding that nothing in this Agreement or in such consent decree shall prevent C and H from:

1. establishing different basis prices for refined sugar destined for its various pricing territories (of which the Intermountain-Northwest territory presently is one) regardless of whether delivery be made at the point of manufacture or destination, and

2. changing the number or boundaries of its pricing territories, including the possible expansion, contraction or subdivision of the present Intermountain-Northwest territory as long as such change does not create a discrimination against the 1812 plaintiffs that would be unlawful under the Robinson-Patman Act, but the consent decree shall remain applicable to any area within the present boundaries of the Intermountain-Northwest territory, and

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR INDUSTRY ANTITRUST LITIGATION

MDL DOCKET NO. 201

THIS DOCUMENT RELATES TO:

SUN GARDEN PACKING COMPANY,

Plaintiff,

v.

CONSOLIDATED FOODS CORPORATION,
et al.,

Defendants.

No. C74 2687 GHB

ENG-SKELL COMPANY,

Plaintiff,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C74 2689 GHB

ZIM'S RESTAURANTS, INC.,

Plaintiff,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C74 2698 GHB

OPINION AND ORDER RE CLASS ACTIONS

GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

PAOLI'S RESTAURANTS, INC.,
Plaintiff,
v.
CONSOLIDATED FOODS CORPORATION,
et al.,
Defendants.

No. C74 2711 GHB

FANTASIA CONFECTIONS, INC.,
Plaintiff,
v.
CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,
Defendants.

No. C74 2728 GHB

RALEY'S, INC., et al.,
Plaintiffs,
v.
CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,
Defendants.

No. C75 0041 GHB

BLUMS OF SAN FRANCISCO, INC.,
et al.,
Plaintiffs,
v.
CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,
Defendants.

No. C75 0117 GHB

FOOD MART-EUREKA, et al.,
Plaintiffs,
v.
CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,
Defendants.

No. C75 0504 GHB

OWENS ENTERPRISES, INC., et al.,
Plaintiffs,
v.
CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,
Defendants.

No. C75 0505 GHB

GENESIS GROUP, INC., et al.,
Plaintiffs,
v.
GREAT WESTERN SUGAR COMPANY,
et al.,
Defendants.

No. C75 1120 GHB

SUPERIOR BEVERAGE COMPANY,
INC., et al.,
Plaintiffs,
v.
GREAT WESTERN SUGAR COMPANY,
et al.,
Defendants.

No. C75 1121 GHB

BALDI CANDY COMPANY,
Plaintiff,
v.
GREAT WESTERN SUGAR COMPANY,
et al.,
Defendants.

No. C75 1122 GHB

HEINEMANN'S, INC., an Illinois
corporation, et al.,
Plaintiffs,
v.
GREAT WESTERN SUGAR COMPANY,
et al.,
Defendants.

No. C75 1123 GHB

PLANTATION BAKING COMPANY, INC.,
et al.,

Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1125 GHB

ZION INDUSTRIES, INC., et al.,

Plaintiffs,

v.

AMALGAMATED SUGAR COMPANY, et al.,

Defendants.

No. C75 1126 GHB

TREASURE ISLAND FOODS, INC.,
et al.,

Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1127 GHB

HOME JUICE COMPANY, et al.,

Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1128 GHB

SEECO, INC., et al.,

Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1131 GHB

MOTHER'S CAKE & COOKIE CO.,

Plaintiff,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C75 1404 GHB

SCANDIA BAKERY, a California
partnership,

Plaintiff,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C75 1424 GHB

EWALD BROS., INC.,

Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1455 GHB

KING KELLY MARMALADE COMPANY,
et al.,

Plaintiffs,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C75 1545 GHB

GENERAL BOTTLERS, INC.,

Plaintiff,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C75 1546 GHB

MERCHANTS RESTAURANT, INC.,
et al.,

Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1553 GHB

SCHULZE AND BURCH BISCUIT CO.,

Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1554 GHB

GRIST MILL CO.,

Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1555 GHB

THE BROTHERS RESTAURANTS, INC.,

Plaintiff,

v.

AMALGAMATED SUGAR COMPANY,
et al.,

Defendants.

No. C75 1606 GHB

STEAK-O-RAMA, INC., et al.,

Plaintiffs,

v.

AMALGAMATED SUGAR COMPANY,
et al.,

Defendants.

No. C75 1674 GHB

ZARDA BROTHERS DAIRY, INC.,
et al.,

Plaintiffs,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C75 1696 GHB

WASHINGTON BEVERAGES, INC., et al.,

Plaintiffs,

v.

UTAH-IDAHO SUGAR COMPANY, et al.,

Defendants.

No. C75 1129 GHB

MISSOURI FARMERS ASSOCIATION,
INC., et al.,

Plaintiffs,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C75 1808 GHB

JOHN'S FOOD CENTERS, INC.,
et al.,

Plaintiffs,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

No. C75 1824 GHB

STATE OF COLORADO,

Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1931 GHB

STATE OF KANSAS,
Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

STATE OF CALIFORNIA,
Plaintiff,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, et al.,

Defendants.

STATE OF ILLINOIS,
Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

STATE OF MINNESOTA,
Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

STATE OF OREGON,
Plaintiff,

v.

UTAH-IDAHO SUGAR CO., et al.,

Defendants.

STATE OF WASHINGTON,
Plaintiff,

v.

UTAH-IDAHO SUGAR COMPANY, et al.,

Defendants.

1812 DISTRIBUTING CORP., et al.

Plaintiffs,

v.

UTAH-IDAHO SUGAR COMPANY, et al.,

Defendants.

No. C75 2350 GHB

No. C75 1401 GHB

No. C75 1124 GHB

No. C75 1456 GHB

No. C75 1441 GHB

No. C75 1129 GHB

No. C75 1129 GHB

STATE OF INDIANA,
Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

THE STATE OF ARIZONA,

Plaintiff,

v.

CALIFORNIA AND HAWAIIAN SUGAR
COMPANY, a California corporation,
et al.,

Defendants.

STATE OF WISCONSIN,

Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

CFS CONTINENTAL-LOS ANGELES, INC.;
CONTINENTAL-SAN DIEGO, INC.;
CONTINENTAL-P.M., INC.; CONTINENTAL
G&M FOODS, INC.; PRICE WHOLESALE
GROCERY, INC.; CONTINENTAL-PALOMAR
OF ARIZONA, INC.; CONTINENTAL-
MINNESOTA, INC.; CONTINENTAL-
INDIANAPOLIS, INC.; CONTINENTAL-
HOXIE, INC.; CONTINENTAL SOUTH
CHICAGO, INC.; CONTINENTAL-KEIL;
INC.; CONTINENTAL NORTH CHICAGO,
INC.; CONTINENTAL COFFEE COMPANY
OF HOUSTON; CONTINENTAL-DECATUR,
INC.; CONTINENTAL COFFEE COMPANY
OF COLORADO; POLUNSKY'S, INC.;
CONTINENTAL BIG RED, INC.;
CONTINENTAL-PANETTA, INC.;
CONTINENTAL WAHOUSE MARKET, INC.;
CONTINENTAL-ARTIC, INC.; and
CONTINENTAL NATIONAL, INC.,
Plaintiffs

v.

CALIFORNIA & HAWAIIAN SUGAR COMPANY,
et al.

Defendants.

UNITED A.G. COOPERATIVE, INC.,
Plaintiff,

v.

AMALGAMATED SUGAR COMPANY,
et al.,

Defendants.

BRESLER ICE CREAM CO.,
Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY, et al.,

Defendants.

No. C76 214 GHB

No. C75 2581 GHB

No. C75 2400 GHB

No. C75 2605 GHB

No. C75 1756 GHB

No. C75 1908 GHB

INTERNATIONAL INDUSTRIES, INC., et al.,

Plaintiffs,

v.

CALIFORNIA & HAWAIIAN SUGAR COMPANY,
et al.,

Defendants.

No. C75 1910 GHB

MILFORD CANNING COMPANY,

Plaintiff,

v.

GREAT WESTERN SUGAR COMPANY, et al.,
Defendants.

No. C75 2025 GHB

TRI-R VENDING SERVICE CO.,

Plaintiff,

v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants.

No. C75 2026 GHB

SETHNESS GREENLEAF INC.,

Plaintiff,

v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants.

No. C75 2027 GHB

SCHWAN'S SALES ENTERPRISES, INC.,

Plaintiff,

v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants.

No. C75 2457 GHB

INTERNATIONAL KINGS TABLE, INC.,

Plaintiff,

v.

UTAH-IDAHO SUGAR CO., et al.,
Defendants.

No. C75 2564 GHB

GOELITZ CONFECTIONARY COMPANY,

Plaintiff,

v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants.

No. C76 0113 GHB

INTERNATIONAL INDUSTRIES, INC., et al.,

Plaintiffs,

v.

CALIFORNIA & HAWAIIAN SUGAR COMPANY,
et al.,
Defendants.

No. C75 1909 GHB

INTERNATIONAL KINGS TABLE, INC.,

Plaintiff,

v.

UTAH-IDAHO SUGAR CO., et al.,
Defendants.

No. C75 2563 GHB

INTERNATIONAL INDUSTRIES, INC.,
et al.,

Plaintiffs,

v.

CALIFORNIA & HAWAIIAN SUGAR
COMPANY, et al.,
Defendants

No. C75 1911 GHB

ARMAND'S INC., et al.,

Plaintiffs,

v.

UTAH-IDAHO SUGAR CO., et al.,
Defendants.

No. C75 2561 GHB

COURTESY FOOD MART, INC., et al.,

Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY,
et al.,

Defendants.

No. C75 2247 GHB

CLARENCE HECKEL and GAIL HAYES,
d/b/a "ED'S MARKET,"

Plaintiffs,

v.

UTAH-IDAHO SUGAR COMPANY,
Defendants.

No. C75 2562 GHB

Pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, various plaintiffs move this Court for an order determining that certain actions involved in this litigation commenced on behalf of similarly situated persons and entities shall proceed as class actions and, furthermore, that the classes plaintiffs seek to represent shall be defined as follows:

- I. Class One -- consisting of all industrial sugar users and retail grocers ^{1/} in sixteen states ^{2/} that have purchased refined sugar in the Chicago-West Territory during the period from 1955 to the present;
- II. Class Two -- consisting of all industrial sugar users and retail grocers in two states and two cities ^{3/} that have purchased refined sugar in the California-Arizona Territory during the period from 1949 to the present;
- III. Class Three -- consisting of all industrial sugar users and retail grocers in five states ^{4/} that have purchased refined sugar in the Intermountain-Northwest Territory

^{1/} Concerning the industrial sugar users for this and the following classes, such entities must have purchased refined sugar for use or incorporation in producing, manufacturing or processing foodstuffs, including beverages, for human or animal consumption, and must not have offered such sugar for resale as sugar. Restaurants included within this class shall be limited to those restaurants that are or were, during the relevant time, (a) members of the National Restaurant Association, the Foodservice and Lodging Institute, or their local affiliated organizations, or (b) franchisees or franchisors that are or were engaged in the business of franchising restaurants in one of the three sugar areas as it pertains to these respective class actions. Hospitals and health care institutions included within this class shall be limited to those identified in the American Hospital Association's annual directory, "Guide to the Health Care Field," or members of the Federation of American Hospitals.

^{2/} Concerning the retail grocers for this and the following classes, such entities must have had gross annual sales in excess of \$150,000.00 in any year during the relevant time. A business operating more than one retail grocery store may aggregate its gross annual sales for all stores to satisfy this "gross annual sales" requirement.

^{3/} These sixteen states -- Indiana, Illinois, Iowa, Minnesota, Wisconsin, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Montana, Missouri, New Mexico, Oklahoma, Texas and Wyoming (east of the town of Rawlins) -- hereinafter shall be referred to collectively in accordance with their sugar industry designation, the "Chicago-West Territory."

^{4/} These two states and two cities -- California, Arizona and the cities of Las Vegas and Reno, Nevada -- hereinafter shall be referred to collectively in accordance with their sugar industry designation, the "California-Arizona Territory."

^{5/} These five states -- Washington, Oregon, Utah, Idaho and Wyoming (west of the town of Rawlins) -- hereinafter shall be referred to collectively in accordance with their sugar industry designation, the "Intermountain-Northwest Territory."

during the period from 1949 to the present; ^{6/}

- IV. Class Four -- consisting of the State of California and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- V. Class Five -- consisting of the State of Illinois and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- VI. Class Six -- consisting of the State of Minnesota and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- VII. Class Seven -- consisting of the State of Oregon and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- VIII. Class Eight -- consisting of the State of Washington and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1965 to the present;
- IX. Class Nine -- consisting of the State of Kansas and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- X. Class Ten -- consisting of the State of Colorado and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- XI. Class Eleven -- consisting of the State of Arizona and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- XII. Class Twelve -- consisting of the State of Wisconsin and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;
- XIII. Class Thirteen -- consisting of the State of Indiana and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1955 to the present;
- XIV. Class Fourteen -- consisting of all otherwise unrepresented states, and their respective cities, counties and other political subdivisions and public entities, including hospital and school districts, all of which are located within the Chicago-West Territory and who have purchased refined sugar

^{6/} Excluded from these first three classes are (a) the defendants, their subsidiaries and affiliated business entities, (b) members of the public who purchased sugar for non-business use, (c) governmental entities, and (d) each plaintiff who has instituted and presently is maintaining his or its own non-class action.

directly or indirectly during the period from 1949 to the present; ⁷

- XV. Class Fifteen -- consisting of all otherwise unrepresented states, and their respective cities, counties and other political subdivisions and public entities, including hospital and school districts, all of which are located within the Intermountain-Northwest Territory and who have purchased refined sugar directly or indirectly during the period from 1949 to the present; ⁸
- XVI. Class Sixteen -- consisting of all household units within the State of Illinois who purchased refined sugar at retail for use or consumption during the period from 1955 to the present; ⁹
- XVII. Class Seventeen -- consisting of all household units within the State of Colorado who purchased refined sugar at retail for use or consumption during the period from 1949 to the present; ¹⁰
- XVIII. Class Eighteen -- consisting of all household units within the State of Arizona who purchased refined sugar at retail for use or consumption during the period from 1949 to the present; ¹¹
- XIX. Class Nineteen -- consisting of all household units within the State of California who purchased refined sugar at retail for use or consumption during the period from 1949 to the present; ¹²
- XX. Class Twenty -- consisting of all citizens and residents of the State of Oregon who purchased refined sugar at retail for use or consumption during the period from 1955 to the present; ¹³
- XXI. Class Twenty-One -- consisting of all citizens and residents of the State of Washington who purchased refined sugar at retail for use or consumption during the period from 1965 to the present; ¹⁴
- XXII. Class Twenty-Two -- consisting of all household units within the State of Indiana who purchased refined sugar at retail for use or consumption during the period from 1955 to the present; ¹⁵
- ³ Plaintiffs Illinois, Minnesota and Kansas propose to include Class Fourteen within their respective putative class actions; namely, Class Five, Class Six and Class Nine.
- ⁸ Plaintiffs Oregon and Washington propose to include Class Fifteen within their respective putative class actions; namely, Class Seven and Class Eight. For purposes of this Class Fifteen, the relevant period shall be assumed to be from 1949 to the present. Compare the relevant period of time with that asserted in Class Eight, *supra*.
- ⁹ Plaintiff Illinois proposes to include Class Sixteen within its putative class action; namely, Class Five.
- ¹⁰ Plaintiff Colorado proposes to include Class Seventeen within its putative class action; namely, Class Ten.
- ¹¹ Plaintiff Arizona proposes to include Class Eighteen within its putative class action; namely, Class Eleven.
- ¹² Plaintiff California proposes to include Class Nineteen within its putative class action; namely, Class Four.
- ¹³ Plaintiff Oregon proposes to include Class Twenty within its putative class action; namely, Class Seven.
- ¹⁴ Plaintiff Washington proposes to include Class Twenty-One within its putative class action; namely, Class Eight.
- ¹⁵ Plaintiff Indiana proposes to include Class Twenty-Two within its putative class action; namely, Class Thirteen.

XXIII. Class Twenty-Three -- consisting of all persons or entities in the Chicago-West Territory, in the California - Arizona Territory and in the Intermountain-Northwest Territory who purchased refined sugar or molasses for industrial use in the manufacturing, compounding, formulating or mixing of animal feed and other agricultural products during the period from 1955 to the present; and

XXIV. Class Twenty-Four -- consisting of all persons or entities in the Chicago-West Territory, in the California-Arizona Territory and in the Intermountain-Northwest Territory who directly or indirectly purchased refined sugar as wholesalers during the period from 1949 to the present for eventual resale to retail consumers.

Upon an examination of the motions, and the supporting and opposing briefs, affidavits and exhibits submitted to this Court by plaintiffs and defendants, and after consideration of the oral arguments presented to this Court by the parties on this matter, ^{certain} plaintiffs' motions are granted with appropriate modifications. These plaintiff classes, represented by plaintiffs and their counsel fully set forth in Appendix A, which follows the opinion and is incorporated herein by reference, shall proceed as class actions pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

I. FACTUAL BACKGROUND

Since certain terminology descriptive of products, operators, economics and markets either wholly or partially unique to the sugar industry will be utilized in this opinion, the following definitions are included:

(a) "molasses" means any grade, type or form of product commonly so defined, including but not limited to, molasses, black strap molasses, and all industrial grades of sugar obtained from sugar beet or sugar cane;

(b) "refined sugar" means any grade, type or form of saccharine product derived from the processing of sugar beets or in the refining of raw cane sugar, all of which contains sucrose, dextrose or levulose;

(c) "refiner" means any company engaged in the processing of sugar beets or in the refining of raw cane sugar into, and the sale of, refined sugar;

(d) "basis price" means the list price of refined sugar sold by a refiner f.o.b. its refinery or processing factory;

(e) "prepaid freight application," commonly known as a "prepay," means a portion of the delivered price for refined sugar equal in amount to a freight charge from a basing point to the customer's location;

(f) "delivered price" means the price of refined sugar delivered to the customer and generally consists of the basis price plus the prepaid freight application;

(g) "allowance" means a discount from the delivered price;

(h) "effective selling price" means the price actually charged to the customer by the refiner and generally consists of the delivered price, less any allowance;

(i) "retail grocer" means any person or entity who purchased during the relevant times hereto refined sugar for the eventual resale of such sugar as sugar for use or incorporation by the consumer in a variety of foodstuffs or beverages for human or animal consumption;

(j) "industrial user" means any person or entity who purchased during the relevant times hereto refined sugar for use or incorporation in the production, manufacture or processing of a variety of foodstuffs or beverages for human or animal consumption, and who did not offer such sugar for eventual resale as sugar;

(k) "institutional user" means any restaurant, airline, hotel, hospital, school, fast-food chain, drinking establishment or other similar institution which purchased refined sugar for use in the sale of food or beverages, or in the dispensing of separately packaged, individual servings of such sugar, all of which were obtained directly or indirectly from refiners both under the refiner's label as well as under the institutional user's private label; and

(l) the "Market" means collectively the Chicago-West Territory, the California-Arizona Territory and the Intermountain-Northwest Territory.

* * *

A brief sketch of the massive sugar industry is possible utilizing the following relevant facts. Molasses and refined sugar are made by processing sugar beets or by refining raw cane sugar derived from crushed sugar cane.

Beet sugar is produced in a single process from sugar beets. Because it is not economical to transport the bulky sugar beets to distant factories, most beet processing plants are located near beet farming areas and operate for four or five months until the crop is processed completely. In parts of California, however, sugar beets are harvested over longer periods of time and the processing plants may run almost all year.

To produce cane sugar, sugar cane is ground into raw sugar at nearby grinding mills that operate seasonally. Thereafter, raw sugar is shipped to cane refineries normally located near seaports, which operate throughout the year by obtaining raw sugar from various worldwide cane growing areas having different harvest seasons. Thus, although pure refined beet and cane sugar are identical chemically, the difference in both technology and organization results in two separate products from the standpoint of industry economics. While grocery customers in many market areas have a preference for cane sugar, which, in turn, supports a price premium for it over beet sugar in grocery product form, many industrial users consider the two types of sugar interchangeable.

Refined sugar is produced regularly in at least the following grades and forms: (1) liquid sucrose sugar; (2) liquid invert sugar; (3) granulated sugar; (4) fine granulated sugar; (5) powdered sugar; (6) brown sugar; (7) bottlers sugar; (8) canners sugar; (9) bakers superfine sugar; (10) cubes; (11) industrial fine sugar; (12) coarse sugar; (13) individual packets; (14) bulk sugar; and (15) bagged sugar. Within these general product categories are various subdivisions.

The different sugar products vary as to price and marketing channels, are consumed in different fashions, and, while fungible, often are not easily interchangeable.

There exist two types of refined sugar -- "grocery sugar" and "industrial sugar." Grocery sugar is commonly defined as granulated, brown and powdered sugar marketed in 25 pound bags or less, cube sugar and all private label sugar. This type of sugar is sold to grocery wholesalers and retailers for eventual resale to consumers. Approximately 22 percent of the refined sugar consumed in the United States is sold as grocery sugar. Within the grocery sugar classification, there is "refiner label sugar" and "private label sugar." Refiner label sugar

is refined grocery sugar produced and packaged by a refiner and later distributed and marketed under that refiner's brand name. Private label sugar is refined grocery sugar produced and packaged by a refiner, but subsequently distributed and sold, without revealing the identity of the refiner, under the private brand name of a purchaser, usually a grocery chain or a buying cooperative. Some retail grocers offer private label sugar in competition with refiner label sugar. There is no qualitative distinction between the refined sugar sold under a refiner's own brand and the refined sugar sold under a purchaser's private label. Generally, however, private label sugar sells for less than the refiner's brand at both wholesale and retail levels.

Industrial sugar is considered to be all granulated refined sugar that is marketed in bulk or in 100 pound bags, all liquid sugar, and all bottlers sugar, canners sugar and bakers superfine. Such sugar is sold in liquid or dry form in bag or bulk containers to firms engaged in the preparation and manufacture of food, beverages and agricultural products. Almost all the remaining 78 per cent not marketed as grocery sugar is utilized as industrial sugar.

Molasses is an entirely different product, with its own quality, quantity and distribution variations, and it is addressed to a different market. As one example, while cane and beet refined sugars chemically are identical, cane molasses and beet molasses are so substantially different that, among other things, the latter is never sold for human consumption.

Refined sugar and molasses are generally used by manufacturers and processors of food, beverages and desserts, and by canners, brewers, packers, bakeries, dairies, delicatessens, restaurants and vendors.

The price of refined sugar is not established in any typical fashion, but varies throughout the sugar industry among sugar producers, regions, and often, among customers. Refined sugar may be sold "price date of purchase" or "price date of shipment," that is, at the market price negotiated at either the dates of purchase or shipment. It is likewise often sold pursuant to contracts for an

price or may be subject to downward "protection," which means that, if the market price rises, the customer retains the lower contract price; if it falls, the customer obtains a lower price. Refined sugar may be marketed on bid for any of the above combinations or may be subject to "most favored customer" provisions. Some refined sugar is manufactured by sugar cane refiners for customers on a "tolling basis," whereby the customer purchases raw sugar, then it is refined by the sugar cane refiner for a monetary fee or an agreement that is the economic equivalent of a fee. Also, refined sugar may be sold for so many "points," that is, a specific number of cents per hundredweight over the New York raw cane sugar price.

Various allowances, discounts or price concessions are often given by refiners. A purchaser may receive longer periods within which it can receive a "prompt payment" discount. If a purchaser can haul its own sugar, it may receive a "hauling allowance" from a factory or warehouse related to the transportation savings. Customers with rail sidings or other facilities that enable them to accept rail carload lots may receive a "direct shipment allowance." Some buyers may receive special price concessions called "competitive allowances."

Finally, refiners may sell either f.o.b. their plants, on the basis of a delivered price, on the basis of prepaid freight applications, or on the basis of a "zone price," which is a fixed delivered price applicable in a certain geographic area. Some prepays are based upon the sellers actual freight, while others reflect transportation costs from the nearest sugar cane refining port of entry to meet competition. All of the above may differ for a particular refiner depending on the time period and the market.

Purchasers of refined sugar can obtain sugar requirements through a variety of distribution channels. Some purchasers buy directly from the refiners. Of those, some may negotiate directly with the refiner or with a broker. A broker may be either a "general broker," handling the sugar of many refiners, an "exclusive broker," handling only one refiner's sugar, or a broker handling a few refiners' sugars or several refiners' sugars in separate markets. Other purchasers buy indirectly through a variety of sources: industrial users from sugar dealers or jobbers; retail grocers from wholesale grocers or from co-operatives; or institutional users from sugar dealers or "full line" food jobbers that carry a complete line of various products needed by

the particular institution.

Total domestic sales of refined sugar in the Market for 1972 amounted to approximately 212 million hundredweights, which had a value of about \$2.5 billion. Of these amounts, over 66 million hundredweights, or approximately \$770 million worth of refined sugar, was sold in the Chicago-West Territory. Five defendants, Great Western Sugar Co., Holly Sugar Corp., California & Hawaiian Sugar Co., American Crystal Sugar Co., and Amalgamated Sugar Co.,^{16/} accounted for over 53 per cent of refined sugar sales in this territory. Concerning the California-Arizona Territory, in excess of 23 million hundredweights, or about \$268 million worth of refined sugar, was sold. Three defendants, C & H, Holly and Consolidated Foods Corp.,^{17/} accounted for more than 69 per cent of refined sugar sales in this territory. Finally, over six million hundredweights, or approximately \$75 million worth of refined sugar, was sold in the Intermountain-Northwest Territory. Of the \$75 million, \$25 million or 33 per cent was grocery sugar. Defendants C & H and Utah-Idaho Sugar Co.^{18/} dominate the grocery sugar sales in this territory.

II. PROCEDURAL BACKGROUND

On December 19, 1974, the United States instituted two criminal actions and three civil injunctive lawsuits in the Northern District of California against several refiners charging them with violations of section one of the Sherman Act. In the first criminal indictment, United States of America v. Great Western Sugar Co., et al., Criminal No. CR 74 830, the government alleged that defendants Great Western, Holly, C & H, American Crystal, Amalgamated and unnamed co-conspirators unlawfully combined and conspired to establish

^{16/} Hereinafter, these defendants shall be referred to as "Great Western," "Holly," "C & H," "American Crystal" and "Amalgamated."

^{17/} Hereinafter, this defendant shall be referred to as "Consolidated."

^{18/} Hereinafter, this defendant shall be referred to as "Utah-Idaho."

artificially the price of refined sugar in the Chicago-West Territory. One of the civil injunctive actions filed that day, United States of America v. Great Western Sugar Co., et al., Civil Action No. C 74 2674, was identical to this indictment, except for the addition of the National Sugarbeet Growers Federation^{19/} as a defendant. In the second criminal indictment and a companion civil injunctive lawsuit, entitled United States of America v. California and Hawaiian Sugar Co., et al., Criminal No. CR 74 829, and United States of America v. California and Hawaiian Sugar Co., et al., Civil Action No. C 74 2675, respectively, the government charged defendants C & H, Holly, the Union Sugar Division of Consolidated plus unnamed co-conspirators with unlawfully combining and conspiring to fix artificially the price of refined sugar in the California-Arizona Territory. The third

civil injunctive action, United States of America v. Utah-Idaho Co., et al., Civil Action No. C 74 2676, contained allegations that defendants C & H, Utah-Idaho and unnamed co-conspirators unlawfully combined and conspired to prevent and suppress the sale of private label sugar in the Intermountain-Northwest Territory.

Subsequently, 21 private civil antitrust lawsuits were commenced in four different federal district courts: nine in the Northern District of California; nine in the Northern District of Illinois; two in the Western District of Washington; and one in the District of Minnesota. On June 2, 1975, the Judicial Panel on Multidistrict Litigation^{20/} transferred the twelve disputes pending in the Northern District of Illinois, the Western District of Washington and the District of Minnesota to the Northern District

^{19/} Hereinafter, this defendant shall be referred to as the "Federation."

^{20/} Hereinafter, the Judicial Panel on Multidistrict Litigation shall be referred to as the "Panel."

of California pursuant to 28 U.S.C. §1407 ^{21/} for coordinated or consolidated pretrial proceedings with the nine lawsuits already pending in that forum, and it assigned the litigation to this Court, and judge, who is sitting by designation under 28 U.S.C. §292(b) ^{22/}. In *re Sugar Industry Antitrust Litigation*, 395 F. Supp. 1271 (J.P.M.L. 1975). Since that time, 37 additional cases pending in thirteen various federal district courts have been transferred to this Court by the Panel. With the filing of 27 more actions in the Northern District of California, the transferee court, the total number of lawsuits currently pending before this court is 85, a significant number of which are putative class actions.

The plaintiffs in these cases consist of various states, on behalf of themselves and their political subdivisions and resident consumers, and industrial, agricultural, institutional and retail consumers. The principal defendants involved in the lawsuits in this litigation to which this opinion relates are C & H, Holly, American Crystal, ^{24/} Amalgamated, Great Western, Consolidated, Utah-Idaho and the Federation. ^{25/} Other defendants named in a minority

^{21/} Section 1407(a) of Title 28 of the United States Code provides, *inter alia*:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

^{22/} Section 292(b) of Title 28 of the United States Code provides: The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

^{23/} Another litigation, also denominated as *In re Sugar Industry Antitrust Litigation*, was established by the Panel in the Eastern District of Pennsylvania and assigned to the Honorable Edward N. Cahn for coordinated or consolidated pretrial activities pursuant to 28 U.S.C. §1407. In *re Sugar Industry Antitrust Litigation*, 399 F. Supp. 1397 (J.P.M.L. 1975); 405 F. Supp. 1404 (J.P.M.L. 1975).

^{24/} On June 14, 1973, defendant American Crystal was dissolved. Its successor is the American Crystal Sugar Company of Fargo, North Dakota, a Minnesota cooperative association.

^{25/} Defendant Federation is an agricultural cooperative that is composed of sixteen member associations of sugar beet growers located in ten western states. These member associations represent approximately 10,000 sugar beet producers. Among other items, the Federation acts as a bargaining agent for growers in contracting with refiners for the sale of the growers' sugar beets.

of these cases are Amstar Corporation, Spreckels Sugar Co., California & Hawaiian Sugar Refining Corp., Ltd., American Sugar Co., Inc., American Crystal Sugar Co. of Fargo, North Dakota, Imperial Sugar Co. and the California Beet Growers Association. ^{26/} Except for defendants Federation and Association, these defendants are corporations or other business entities engaged in the processing of sugar beets or refining raw cane sugar into refined sugar, and the sale thereof to entities for manufacture or inclusion in food products or beverages for human or animal consumption. Furthermore, various corporations, firms and individuals not named defendants in these complaints are designated as co-conspirators who participated in the violations alleged therein, and who performed acts and made statements in furtherance of the averred combinations and conspiracies. These co-conspirators include, but are not limited to, various sugar beet growers' associations, Alexander & Baldwin, Inc., C. Brewer & Company, Limited, AMFAC, Inc., Castle & Cook, Inc. and Theo. H. Davies & Co., Ltd. These latter five corporations collectively are referred to in the sugar industry as the "Big Five."

Jurisdiction for these lawsuits is predicated upon Sections Four, Twelve and Sixteen of the Clayton Act (15 U.S.C. §§15, 22 and 26), as amended by the Robinson-Patman Act; Section Four of the Sherman Act (15 U.S.C. §4), "federal question" jurisdiction (28 U.S.C. §1331), "regulation of commerce" jurisdiction (28 U.S.C. §1337) and; pendent jurisdiction. In addition, venue is based upon Sections Four and Twelve of the Clayton Act (15 U.S.C. §§15 and 22), as amended by the Robinson-Patman Act, and provisions of the general venue section (28 U.S.C. §1391 (b) and (c)).

^{26/} Hereinafter, these defendants shall be referred to as "Amstar," "Spreckels," "C & H Refining," "American Sugar," "American Crystal/ North Dakota," "Imperial" and the "Association," respectively. Defendant Amstar adopted its present name on or about October 28, 1970. During time periods relevant hereto, this defendant has done business as American Sugar and has conducted certain of its operations through Spreckels, which is a division of defendant Amstar.

Generally, the complaints in the actions to which this opinion relates contain allegations that, during the relevant period hereto, sugar cane refineries and sugar beet processing factories of the defendants and their co-conspirators were located in the various states of the United States, and that substantial quantities of the molasses and sugar refined and processed at those refineries and factories were marketed and shipped interstate to customers located throughout the sugar market. Moreover, the complaints aver that there was a substantial and continuous flow of molasses and refined sugar in interstate commerce from the sugar cane refineries and sugar beet processing factories of the defendants and their co-conspirators to their customers.

Plaintiffs charge that the defendants and their co-conspirators engaged in a combination and conspiracy to restrain unreasonably the aforementioned interstate trade and commerce in violation of Section One of the Sherman Act (15 U.S.C. §1), Section Two(a) of the Clayton Act (15 U.S.C. §13(a)), as amended by the Robinson-Patman Act, and of various sections of the antitrust laws of the States of California, Colorado and Minnesota, and to monopolize or to attempt to monopolize this interstate trade and commerce in violation of Section Two of the Sherman Act (15 U.S.C. §2), and of the antitrust laws of the States of California, Colorado and Minnesota.

This combination and conspiracy, plaintiffs contend, consisted of a continuing agreement, understanding and concert of action among the defendants and their co-conspirators (1) to establish and raise the basis prices for molasses and refined sugar, (2) to establish prepaid freight applications, (3) to eliminate, reduce and restrain the providing of allowances to customers for molasses and refined sugar, (4) to establish, raise, maintain and stabilize the effective selling prices for molasses and refined sugar, (5) to refuse to sell or to limit the sale of private label sugar, (6) to discourage customers from entering into any commitments for the purchase of private label sugar, (7) to threaten or to employ, price discrimination and sales below cost to force agreement upon the non-utilization of private label sugar and upon

establishing, raising, maintaining and stabilizing the effective selling prices for molasses and refined sugar, (8) to use the monopoly power enjoyed by various of the defendants and their co-conspirators in certain markets to finance and support the previously described practices, and (9) to maintain prior agreed upon market shares within the various markets for molasses and refined sugar sales. As a result of these allegations, every separate sugar product, every method of marketing refined sugar and molasses, and every level and method of distribution is before the court.

Plaintiffs contend that in formulating and effectuating their combination and conspiracy to restrain trade and to monopolize, defendants and their co-conspirators combined and conspired, inter alia, to do the following:

- (1) caused brokers and other third-parties to disseminate and communicate among refiners of molasses and refined sugar price information and assurances regarding defendants' concerted actions in establishing and stabilizing molasses and refined sugar prices;
- (2) discussed data and entered into agreements concerning the computation and utilization of prepaid freight applications based on artificial basing points with the purpose and effect of establishing and maintaining uniform prepaids and prices for molasses and refined sugar;
- (3) published and otherwise disseminated among refiners base point pricing lists and prepay tables in accordance with agreements previously reached;
- (4) met at the Olympic Club in San Francisco, California, to discuss whether to offer private label sugar for sale in the Market particularly in the Intermountain-Northwest Territory;
- (5) eliminated all price competition between themselves, existing as a result of defendants' respective geographic locations, by the implementation and utilization of a basing point delivered price system, which required purchasers of molasses and refined sugar to pay, as part of the price of the molasses or refined sugar being purchased and as a condition and term of the sale, the transportation charges from one or more basing points to the place of delivery; thus

for any given destination, each defendant utilized the same basing point in the computation of the delivered price of molasses and refined sugar, regardless of whether it actually was shipped from such basing point or from another location;

(6) required purchasers, as a condition and term of purchasing molasses and refined sugar from them, to pay substantially inflated, or "phantom," freight charges far in excess of actual freight costs to the point of delivery;

(7) manipulated, established and affected the prices of molasses and refined sugar by meeting and communicating with each other by telephone and other means, by adopting and utilizing uniform geographic price zones, by adopting and utilizing systematic methods of pricing, and by adopting and utilizing standardized methods of determining the cost of the various component items that affect and partially determine the selling price of molasses and refined sugar;

(8) exchanged trade information and adopted other similar methods of doing business, all with the purpose and result of stabilizing the price of sugar at noncompetitive levels and of controlling and affecting the price of products manufactured by or with molasses or refined sugar;

(9) sold sugar to purchasers in some parts of the United States at delivered prices lower than the delivered price at which they sold sugar to plaintiffs without consideration of actual cost differentials, thus putting plaintiffs who use large amounts of sugar in the manufacture of products that they sell in interstate commerce at a considerable competitive disadvantage with customers who produce and sell similar products in competition with plaintiffs; and

(10) artificially suppressed competition among themselves in the purchase of molasses, sugar beets and sugar cane by adopting joint and uniform contracts for the purchase of such commodities, all for the purpose and with the intent of depressing and stabilizing the price at which they would purchase sugar beets and sugar cane from the growers thereof, with the ultimate objective of manipulating, increasing, affecting and stabilizing the price of molasses and refined sugar.

Plaintiffs seek the following relief for the defendants' alleged federal and state antitrust law violations: treble and compensatory damages, injunctive relief; divestiture of those assets or capabilities enabling defendants to violate state and federal antitrust laws and; attorneys' fees plus costs and expenses.

III. CLASS ACTION CERTIFICATIONS

A. Rule 23(a) Requirements

In deciding whether an action should proceed as a class action this court must be satisfied that all the requirements of Fed. R. Civ. P. 23(a) -- numerosity, commonality, typicality and representativeness -- have been established by the party or parties moving for such a determination. Albertson's, Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43 (D. Utah 1973), aff'd 503 F.2d 459 (10th Cir. 1974); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). Accordingly, each prerequisite will be examined as it relates to the present situation.

1. "Numerosity"

Although plaintiffs need only demonstrate that "the class is so numerous that joinder of all members is impracticable" (In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); Contract Buyers League v. F.&F. Investment, 300 F. Supp. 210 (N.D. Ill. 1969), aff'd sub nom., Baker v. F.&F. Investment, 420 F.2d 1191 (7th Cir. 1970), cert. denied, 400 U.S. 821 (1970); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967); Fed. R. Civ. P. 23(a)(1)), in this litigation, joinder of all potential plaintiffs is not only impractical but impossible. Some of the proposed classes encompass potential class members who are not identifiable through any compilation or other reasonable method of identification. Even if joinder were possible, such a technique would be both impractical, because there exist millions of potential class members dispersed throughout the United States, and inequitable, since many of these possible class members would have small claims against defendants that would preclude their joinder in an economic sense. A survey of the various putative class actions reveals their numerical scope.

NUMBERS OF POTENTIAL
CLASS MEMBERS ^{27/}

I. INDUSTRIAL USERS CLASSES		
	NUMBER	TERRITORY
a. Food Processors	1304	California-Arizona
	3403	Chicago-West
	477	Intermountain-Northwest
Subtotal	5,184	
b. Bakeries selling their goods primarily on their own premises	2145	California-Arizona
	5101	Chicago-West
	520	Intermountain-Northwest
Subtotal	7,766	
c. Restaurants, franchises and hospitals, who are members of certain trade associations		(no classification according to various territories provided)
Subtotal	35,000 ^{28/}	
d. Vending machine operators	280	California-Arizona
	1050	Chicago-West
	70	Intermountain-Northwest
Subtotal	1,400	
Total	49,350	
II. RETAIL GROCERS CLASSES		
	NUMBER	TERRITORY
Total	29,500 ^{29/}	(no classification according to various territories provided)
III. AGRICULTURAL USERS CLASS		
	NUMBER	TERRITORY
	2400	California-Arizona
	9000	Chicago-West
	600	Intermountain-Northwest
Total	12,000	
IV. NON-INDUSTRIAL WHOLESALE CLASS		
	NUMBER	TERRITORY
Total	1,193 ^{30/}	(no classification according to various territories provided)

^{27/} The preceding numbers are taken from plaintiffs' own estimates when such estimates are given. In other instances, the source of the estimate is provided.

^{28/} This estimate appears to be understated since, according to the Affidavit of David B. Gold, filed herein in support of class certification, the number of restaurants that are members of certain associations and are within the markets involved number approximately 30,000.

^{29/} Source: 1975 Progressive Grocers Marketing Guidebook.

^{30/} Source: 1976 Thomas Grocery Register, Volume I, published by Thomas Publishing Company, New York, N.Y.

V. STATE ENTITY CLASSES ^{31/}

	NUMBER	
a. California	1,100	school districts
	58	counties
	450	cities and towns
	72	hospital districts
Subtotal	1,680	
Subtotal	120 ^{32/}	
Subtotal	1,800	
b. Colorado	204	school districts
	62	counties
	152	cities and towns
	117	hospital districts
	83	colleges and other public entities
Subtotal	201	police and fire departments
Subtotal	819	
c. Illinois	1,250	school districts
	102	counties
	809	municipalities
	25	hospital districts
Subtotal	2,186	
d. Kansas	330	school districts
	105	counties
	25	cities and towns
	44	hospital districts
	24	various public entities
Subtotal	528	
e. Washington	308	school districts
	39	counties
	265	cities and towns
	38	hospital districts
Subtotal	650	
f. Wisconsin	436	school districts
	72	counties
	576	municipalities
	197	hospital districts
Subtotal	1,281	
g. Arizona		(no classification of various public entities provided)
Subtotal	283	
h. Oregon		(no classification of various public entities provided)
Subtotal	570	
i. Minnesota		(no classification of various public entities provided)
Subtotal	1,399	
Total	9,516	

^{31/} No statistics for Indiana have been provided this Court.

^{32/} In addition, California seeks to represent itself and all its agencies including colleges, universities, and correctional institutions, which are not included in this figure. While California gives no figures, the total must be at least 120.

VI. CONSUMER CLASSES ^{33/}		NUMBER
a. Illinois	11,131,000	^{34/}
b. Colorado	2,496,000	^{35/}
c. Arizona	2,153,000	^{36/}
Total	15,780,000	

Moreover, the fact that the precise number of potential members of these classes cannot be ascertained does not bar the certification of various class actions. Albertson's, Inc. v. Amalgamated Sugar Co., *supra*; Management Television Systems, Inc. v. National Football League, 52 F.R.D. 162 (E.D. Pa. 1971). Based upon the current numbers of potential plaintiffs involved in these class actions, there is ample justification for the view that the present litigation meets the "numerosity" requirement because joinder of these individuals and entities is impracticable.

2. "Commonality"

The second prerequisite is that questions of law and fact exist common to the proposed class members. Gold Strike Stamp Co. v. Christensen, 436 F. Supp. 791 (10th Cir. 1970); Contract Buyers v. P.&P. Investment, *supra*; Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd* 409 F.2d 1239 (8th Cir. 1969); Fed. R. Civ. P. 23(a)(2). This factor has been satisfied. Courts consistently have held that antitrust, price-fixing conspiracy litigations, by their nature, involve common legal and factual questions concerning the existence, scope and effect of the alleged conspiracy. Iowa v. Union Asphalt & Roadoils, Inc., *supra*; In re Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); Minnesota v.

^{33/} These are census estimates concerning the total population of residents in the various states as of July 1, 1974. No statistics have been provided this Court for California, Oregon, Washington and Indiana.

^{34/} Source: Current Population Reports, P-25, #539, pg. 4.

^{35/} Source: Current Population Reports, P-25, #544, pg. 5.

^{36/} Source: Current Population Reports, P-25, #539, pg. 2.

United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968). As a consequence, some of the numerous common issues of law and fact that focus upon defendants' alleged price-fixing conspiracy in violation of the federal and state antitrust laws are:

- whether defendants combined and conspired to establish artificially the basis price and effective selling price of refined sugar and molasses;
- whether defendants combined and conspired to establish artificially prepaid freight applications for refined sugar and molasses;
- whether defendants combined and conspired to eliminate, reduce, prevent and suppress the competitive sale of private label sugar with their refiner's brand sugar;
- whether defendants combined and conspired to eliminate, reduce and prevent the granting of allowances to customers of refined sugar and molasses;
- whether the basis price, the effective selling price, and the prepaid freight applications for refined sugar and molasses in fact artificially were increased by defendants, and whether defendants actually eliminated, reduced or prevented the granting of allowances to customers of refined sugar and molasses; and
- the effect upon the Market generally, and each territory individually, by these variously alleged combinations and conspiracies.

3. "Typicality"

These proposed classes meet the third aspect of Rule 23(a) because the claims and defenses, if any, of the representative plaintiffs are typical of the claims and defenses of the purported class. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); Minnesota v. United States Steel Corp., *supra*; Fed. R. Civ. P. 23(a)(3).

The court in Minnesota v. United States Steel Corp., *id.*, noted that in antitrust cases a representative's claims are typical when all the parties allege a conspiracy to price-fix, that the price-fixing is per se, and that the commodity purchases were made at an inflated

price. An examination of the pleadings in this litigation readily reveals that the claims of the purported representative parties within each territory coincide with the interests of the potential class members in that territory, all of which point to the same broad and common course of illegal conduct. Each putative representative for each territory challenges defendants' alleged unlawful anti-competitive activities within that territory and, furthermore, seeks monetary recovery for artificially high prices relative to refined sugar and molasses that have been paid by all other similarly situated purchasers. For these reasons, the named plaintiffs who seek to represent certain potential class members have claims against the various defendants that are typical of those possible class members' charges.

4. "Representativeness"

Finally, this Court finds that certain plaintiffs in this litigation are representative parties who will protect fairly and adequately the interests of other unnamed plaintiffs.

Iowa v. Union Asphalt & Roadcoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd* 409 F. 2d 1239 (8th Cir. 1969); *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967); *Seligson v. Plum Tree, Inc.*, 55 F.R.D. 259 (E.D. Pa. 1972); Fed. R. Civ. P. 23(a)(4).

The requirement of adequate representation is composed of two elements: (1) the interest of the representative party or parties must coincide with that of the potential class; and (2) the representative party or parties must prosecute vigorously the action. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968). Defendants^{37/} challenge both elements, stating that many of the plaintiffs in this litigation have conflicting interests with some of the possible class members they desire to represent and, consequently, that these antagonistic interests will prevent plaintiffs from exerting their best efforts on behalf of others similarly situated. Because the "representativeness"

^{37/}

Since various groups of plaintiffs and defendants have presented a multitude of arguments, some of which are even conflicting among each respective group, hereinafter, the terms "defendants" and "plaintiffs" shall refer generally to contentions asserted by any group of defendants or plaintiffs, unless otherwise specified.

requirement is one of the most critical factors that must be satisfied before any class action certification can occur, defendants objections must be examined in depth for substantiality.

(a) Coincidence of interests between the purported representative parties and the potential class members

Defendants argue that irreconcilable conflicts of interest among members of plaintiffs' purported classes sufficient to preclude class certification. The first purported conflict is between direct purchasers those persons or entities acquiring refined sugar direct from refiners and indirect purchasers - those obtaining refined sugar from direct purchasers. Defendants essentially argue that the conflict involves the direct purchaser "passing on" price overcharges to the indirect purchaser.

Defendants' contention is misplaced. If any such conflict does exist, the court is satisfied it affects only the amount of damages each purchaser may recover. It does not appear to create any conflict among the potential class members in any class as to the predominating, common legal and factual questions regarding liability. Moreover, various federal courts have declined to consider damage conflicts at the outset unless the asserted conflict is apparent, imminent and on an issue at the heart of the litigation. Potential conflicts of the sort alleged by defendants are at most collateral in these circumstances, and Rule 23(c)(4)(B) provides a mechanism for the subsequent creation of subclasses to deal with latent conflicts that may surface as the litigation progresses. Further, the notice and "opt-out" procedures available under Rule 23(c)(2) provide sufficient opportunity for potential class members to evaluate their positions in the purported class and to decide whether to avail themselves of the representation offered. Finally, this court retains constant supervision pursuant to Rule 23(d) and (e) over the course of this litigation and may insure adequate representation through its ability to create subclasses or otherwise modify this Order.

As for defendants' second asserted conflict of interest between the direct purchasers in the industrial users classes and the indirect purchasers in the retail grocers classes, no actual conflict exists because the classes, as defined and certified, are separate and distinct.

Lastly, defendants' purported third conflict between potential

class members who may or may not benefit from a successful attack on defendants' base point pricing methods insofar as net purchase prices are concerned, to be paid/remains latent at this point. For all the reasons previously enumerated in this court's response to defendants' first asserted conflict, any actual conflict that may arise in the future can be remedied under the powers provided federal courts by Rule 23.

This court finds defendants' contention that the interest of certain states in any damages recovered is antagonistic to that of the consumers they purportedly represent is without merit. Believing that all parties entertain honest motives for their various assertions of claims or defenses thereto, unless otherwise contradicted by their acts or by later events, this court is satisfied that the sole interests of these states is to recoup illegal profits allegedly obtained by defendants for those individuals who have suffered. If any amount of money remains unclaimed, the interests of justice are promoted by having these states utilize such funds for the general benefit of their citizens and residents rather than returning any unclaimed monies to defendants. Any distribution of an unclaimed damage fund will become an administrative matter concerning and involving only class members and a court. See, e.g., In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), pet. for mandamus denied sub nom., Pfizer, Inc. v. Lord, 449 F.2d 119 (2d Cir. 1971); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir. 1971).

Defendants also contend that the States of California, Oregon, Washington, Indiana, Illinois, Colorado and Arizona are not proper representatives of the proposed consumer classes in that these states do not purchase sugar from the same source as consumers -- retail grocers -- but, instead, obtain their refined sugar and molasses from wholesalers. ^{38/}

Furthermore, defendants maintain that these states, which initially commenced their class actions on behalf of citizens and residents, and some of whom have instituted their lawsuits now on behalf of household units, are themselves neither citizens nor residents nor household units.

^{38/} The seven plaintiff states have filed affidavits and briefs demonstrating that some of their political subdivisions and public entities satisfy their sugar needs on occasion by purchasing various sugar commodities from retail grocers.

Although it is not necessary for a state to be a citizen or resident, or a household unit, for its attorney general to represent a class of private consumers similarly injured, Rule 23(a)(4) does require that the state satisfy the "typicality" requirement of Rule 23(a)(3) before it can be designated a proper class representative.

See, e.g., Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972); Illinois ex. rel. Bowman v. Home Fed. S. & L.A., 521 F.2d 704 (7th Cir. 1975); Illinois v. Bristol-Myers Co., 470 F.2d 1276 (D.C. Cir. 1972); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); In re Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); In re Motor Vehicle Air Pollution Control Equipment 52 F.R.D. 398 (C.D. Cal. 1970). In the present litigation, these plaintiff states have failed to meet the threshold requirement of "typicality," whereby a party seeking appointment as a class representative must be a member of the class he or it purports to represent. Illinois ex rel. Bowman v. Home Fed. S. & L.A., supra; 38 J. MOORE, FEDERAL PRACTICE ¶23.04, at 23-254 (2d ed. 1974). What is at issue is whether these state plaintiffs are "consumers" in the same sense of the word as used to describe individual retail purchasers who are end-users of refined sugar. Even if these states purchased some of their sugar products from retail grocers, the impact and damages aspects of their claims raise issues peculiar only to themselves, their political subdivisions and public entities, all of whom are members of unique governmental entity classes. As with the industrial user, retail grocer, non-industrial wholesaler and agricultural user classes, it is not significant for purposes of this Order from whom these states purchased sugar products, but rather, in what manner they use the sugar commodities obtained.

The dichotomy of interests between a state and its consumers in this situation presents a bar to the representation of the consumers by the plaintiff states. Different classes must be created for governmental entity and consumer classes.

Given a proper set of circumstances, a state might be certified as the class representative for private consumers in federal antitrust actions. See, e.g., In re

Coordinated Pretrial Proceedings in Antibiotic Actions, supra;
In re Ampicillin Antitrust Litigation, supra; In re Motor Vehicle
Air Pollution Control Equipment, supra. The plaintiff states argue
their reliance upon the few federal antitrust litigations wherein
states have been certified as the representatives of their citizens
and residents. Each cited case, however, is distinguishable from
the situation presently before this court. See
West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970),
aff'd 440 F.2d 1079 (2d Cir. 1971), cert. denied sub nom., Colter
Drugs, Inc. v. Chas. Pfizer & Co., Inc., 404 U.S. 871 (1971).

In the litigated tetracycline drug litigation,
In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions,
supra, the court determined that the state claims were typical of
the consumer claims, but it did so because

[a]ll seven of the states support welfare
programs which reimburse recipients for
the purchase of prescription drugs, including
broad spectrum antibiotics of the type
involved in this litigation. Because of
these reimbursements the states stand in
the shoes of a substantial number of purchasers
of the drugs in question during the relevant
periods and throughout their jurisdictions.
[Footnote omitted.] Id. at 280.

Similarly, the court in In re Ampicillin Antitrust Litigation, supra,
expressly quoted and approved this "reimbursement" theory in certi-
fying a state-represented consumer class. In contrast no such
relationship between the claims of the seven plaintiff states and
their citizens, residents or household units has been nor can be
established by plaintiffs on a welfare reimbursement theory, or
other similar theory. Therefore, even though by its ruling this
court will leave consumers unrepresented in this litigation unless
proper class representatives are subsequently found, it has no
intention of manipulating Rule 23(a)(3) and (a)(4) in such a fashion.

Finally, defendants contend that the States of Illinois,
Minnesota, Kansas, Washington and Oregon are improper class repre-
sentatives for other unrepresented states or their political sub-
divisions. The court agrees. The attorneys general of the plaintiff
states do not appear to possess the power pursuant to their respective

state laws to represent the interests of other sovereign states and
their political subdivisions.^{39/} The boundaries of an attorney
general's power extend to protecting the interests of state citizens
and residents. No state interest is served or advanced by a
state attorney general expending public funds for litigation purposes
on behalf of and for the benefit of ^{other} sovereign states and their
political subdivisions.

Each of the several unrepresented states in the Market have
their own substantial sovereign interests and are able and empowered
to assert claims through their attorneys general should they desire
to do so. The power and right of every state to decide whether its
interests would be furthered by a class action on behalf of its own
political subdivision should not be infringed by the five plaintiff
states. Whenever potential class members have both a strong interest
in controlling their own destiny and the resources and inclination
to protect their rights, the class action device may not be superior
to other available means of adjudication.

Al Barnett & Son, Inc. v. Outboard Marine
Corp., 64 F.R.D. 43 (D. Del. 1974); Crasto v. Estate of Kaskel,
63 F.R.D. 18 (S.D.N.Y. 1974); In re Ampicillin Antitrust Litigation,
55 F.R.D. 269 (D.D.C. 1972).

Defendants urge this Court, in the event any classes are
certified, to limit the class representatives for each class to
no more than the parties plaintiff in a single lawsuit. They contend
that the proposed multiple representation of various classes is
unnecessary, and many of the purported representatives seek to
represent industrial users in all three geographic territories even
though some of these potential representatives do not have any
business affiliation in a particular territory. Defendants contend
multiple representation of the several proposed classes by more
than 130 plaintiffs who, in turn, are represented by in excess of
55 law firms, is contrary to both the "adequacy of representation"

^{39/} It is proper for this court to consider state law in
determining whether to certify these proposed classes.
Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266
(5th Cir. 1976).

provisions of Rule 23(a)(4) and the remand requirement of Section 1407. While Rule 23(a)(4) requires that this court select only the best available representatives for these putative classes Section 1407(a) mandates that every action transferred by the Panel "... shall be remanded by the Panel at or before the conclusion of such pretrial proceedings. . . [to the transferor district] unless it shall have been previously terminated." 28 U.S.C. §1407(a). If plaintiffs' class action motions are granted in the form requested, defendants maintain that, upon the conclusion of centralized pretrial activity, assuming the lawsuits are not otherwise terminated, particular classes and class representatives will be remanded to numerous and different judicial districts for trial. The result of such a remand will be confusion and conflict among, and unmanageability of, these classes for trial. In addition, defendants assert that multiple representation impedes the notice requirement mandated by both due process and Rule 23(c)(2) because, in considering whether to exercise his right of exclusion, a potential class member will be required to evaluate the qualifications of several representatives prosecuting a particular class action against defendants. A further contention by defendants is that joint representation will generate duplicative legal effort and excessive legal fees.

Rule 23(a)(4) and the relevant decisional law require this court, when confronted with competing or similar requests for class certification, to evaluate the qualifications of each proposed representative and counsel therefore, to designate the most qualified. See Manual for Complex Litigation, "Selecting the Representatives of Classes and Subclasses," Part I, §1.44 (rev. ed. 1973). This does not mean that multiple representation of a class is, by itself, contrary to the interests of that class. Policy considerations expressed in the Manual for Complex Litigation, and the nature and scope of this litigation, commend this form of representation. As the Manual for Complex Litigation notes:

In appropriate circumstances the court may properly determine that the class will be best represented by designating as representatives all of the formal parties seeking to act as representatives.

. . .

In forming classes, choosing representative parties for classes, and in selecting counsel to represent classes and subclasses, the court . . . should, in keeping with the provisions of Rule 23, be guided by the best interests of the members of the classes and subclasses, and the goal of the speedy, inexpensive and just determination of the case. Manual for Complex Litigation, "Selecting the Representatives of Classes and Subclasses," Part I, §1.44 (rev. ed. 1973).

With these considerations in mind, the court will now address defendants' arguments. First, there does not appear to be any antagonistic interests among the purported representatives of the industrial user classes and the potential members of these classes. The industrial user classes are comprised of a variety of businesses which range from confectioners to beverage manufacturers to bakeries and to restaurants. Since a number of proposed representatives for the industrial user classes are in the same businesses as those of the expected class members, the particular interests of each business group will be adequately represented. In the court's designation of representatives for this litigation, no representative will be permitted to represent similar industrial users which operate in a territory distinct from the one in which the representative does business.

Contrary to defendants' argument that multiple representation will prove to be inadequate, this court believes that, in this litigation, multiple representatives are necessary. Adequate protection of the interests of potential class members is dependent largely upon the skill and resources of counsel for the proposed representative parties. Each of the plaintiffs' attorneys herein has the requisite skills to guard adequately the interests of these classes. Nevertheless, due to the sheer size of this litigation, none have the resources to prosecute expeditiously these various class actions along.

Defendants' concern for inter- and intra-class conflicts, if and when the individual lawsuits in this litigation are remanded to their respective transferor courts for trial, is misplaced. The representatives for the various classes have been selected in such a fashion that, if some or all of these class actions are remanded and tried in different transferor forums, there will be at least one representative for each class. Considering the track record of past

multidistrict antitrust litigations involving class actions, there is a substantial possibility, if not probability, this litigation will not come to trial in any forum.

Defendants' argument that multiple representation will require a potential class member, when contemplating whether to exclude himself from a relevant class, to examine the qualifications of many representatives and their counsel, is without merit. Realistically, the majority of potential class members have relatively small financial interests in this litigation and it is not likely they will occupy much of their time with such concern. Were it not for the proposed class actions, such persons would find it uneconomical to proceed against the defendants alone and would not be represented. Should any claimant examine the skill, qualifications and resources of the proposed representatives and their attorneys, whatever negative inference that may be drawn therefrom is far outweighed by the benefits to be derived from multiple representation.

Finally, the designation of multiple class representatives will not result in a substantial increase, if any, in the cost of legal representation and in duplicative discovery efforts. The benefits to any class member from the prompt adjudication of this litigation are apparent. The completion of discovery will be expedited, discovery should not be repetitive; therefore, the actual expenses of representation should remain at much the same level as if each class member were prosecuting his own lawsuit. Moreover, the quality of the legal work performed may be enhanced through participation of several attorneys and their capacity to handle a variety of tasks simultaneously. In short, multiple class representation will enable plaintiffs to marshal effectively their financial and legal resources to prosecute this litigation.

(b) Vigorous prosecution of the class actions
by the putative representative parties

The second requirement of "adequate representation" -- that the representatives of the putative classes must prosecute vigorously the action -- is established. The initial requirement of "adequate representation" has been satisfied, which, if it had not been so, would have precluded a finding of "adequate representation." Also, the representative plaintiffs have a substantial monetary investment to warrant their prosecution of these actions on behalf of their classes.

Finally, this court finds counsel for the representative plaintiffs to be capable and sufficiently experienced. Among plaintiffs' attorneys are firms and state attorneys general who have undertaken the principal responsibility for managing several multidistrict antitrust litigations involving class actions.

In summary, it appears at this time that (1) no real conflict of interest exists between any of the plaintiffs and the putative class members, and that (2) plaintiffs are committed to a vigorous prosecution of this matter. Should circumstances arise necessitating the substitution or redesignation of any class representative or counsel therefor, this court will not hesitate to do so consistent with the powers and discretion enumerated in Rule 23.

B. Rule 23(b)(3) Requirements

In addition to the mandate of Rule 23 that all of the prerequisites of subdivision (a) be satisfied before an action may be maintained as a class action, this Court must further determine whether plaintiffs have established that (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); Contract Buyers League v. P. & E Investment, 300 F. Supp. 210 (N.D. Ill. 1969), aff'd sub nom., Baker v. E & P. Investment, 420 F.2d 1191 (7th Cir. 1970), cert. denied, 400 U.S. 821 (1970); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Fed. R. Civ. P. 23(b)(3). Because this is an area of great dispute amongst the parties to this litigation, a detailed analysis of their respective positions and contentions is warranted.

1. "Common Questions of Law or Fact Must Predominate Over Individual Questions"

Plaintiffs assert that common issues of law and fact exist and predominate over individual questions due to the alleged broad combination and conspiracy by defendants. Defendants contend that this litigation is dissimilar to one in which plaintiffs charge common defendants with agreeing on a common price-fixing formula applied equally in all basis prices, prepaid freight applications, delivery prices, allowances and effective selling prices which was imposed

in all territories, on all customers, at all times. Because the actual pricing of refined sugar and molasses fluctuated depending upon the time period, parties, localities, sugar products and distribution levels, defendants contend that proof of a particular price change during a specific time period necessarily involves individual factual and legal issues. Defendants also argue that the presence of numerous indirect purchasers compounds the inappropriateness of the proposed classes because it will be necessary to trace their purchases of refined sugar or molasses through the chain of distribution and to establish at each level thereof whether overcharges were absorbed or not. A theory of "fluid recovery" is claimed by defendants to be unconstitutional under Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), and - utilizing a formula to be applied generally is inappropriate for this litigation, which involves extensive and individualized proof. Because this question is one of "impact," defendants contend plaintiffs must adjudicate it during the liability rather than the damage stage of trial. Finally, defendants argue plaintiffs must individually demonstrate that defendants fraudulently concealed their activities from each particular plaintiff and, furthermore, every plaintiff failed to discover the actual facts through the exercise of due diligence.

This court remains unpersuaded by any of the foregoing arguments of defendants because of the unique facts of this litigation. Basically, sugar is a fungible commodity with a single purpose: a sweetener. Federal Trade Commission Report No. R-6-15-24 "Staff Economic Report -- The United States Sugar Industry," July 1975. Whether refined sugar is obtained from sugar cane or sugar beets, it has the same chemical composition -- $C_{12}H_{22}O_{11}$. Id. The Federal Trade Commission Report further states that the sugar industry

... is characterized by very high seller concentration, relatively low buyer concentration, moderate economies of scale, virtually no product differentiation and a highly inelastic demand for its product. (Emphasis added) Id.

Moreover, the historical tie of beet sugar pricing to that of cane sugar was judicially recognized by the Tenth Circuit in Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 462 (10th Cir. 1974) where the court stated:

Sugar, whether it be cane or beet, is a fungible goods, with the ultimate product being chemically identical. Hence, if there were a retail price differential between cane and beet sugar, the buying public would generally purchase the lower price sugar, be it beet or cane, since there is little real difference between the two. Because of this identity, the pricing policy followed by the defendants is to meet the price for which cane sugar sells in any given locality, and the defendants will quickly follow any increase or decrease in the price of cane sugar. The defendants, according to testimony, cannot profitably operate if they undersell the charge made for cane sugar. On the other hand, the defendants never attempt to charge more than the figure for which cane sugar is selling in a particular market, since, as indicated, the buying public would purchase the sugar, be it cane or beet, selling for the lower price, sugar being an essentially fungible goods. It is for these reasons that the defendants attempt to tie their pricing into that of the cane sugar processors. The cane sugar processors were in the continental United States market before the beet sugar processors, and it is perhaps for this reason, i.e., a custom that has developed in the trade, that the beet sugar processors gear their pricing to that of the cane sugar processors, rather than vice versa. In any event, that's the way it is.

For these reasons, it appears that defendants view different forms of refined sugar as sufficiently interchangeable to warrant their charging nearly identical prices for refined sugar obtained from either sugar cane or sugar beets. Sugar, regardless of its form or container size remains sugar. Furthermore the channels of distribution are quite simple because refined sugar and molasses are distributed in one of two ways -- directly or through wholesalers. Approximately 80 per cent of refined sugar and molasses is sold to industrial users and retail grocers by defendants themselves or through their brokers, who are, in effect, defendants' agents. ^{40/} The brokers are paid a fixed amount per hundredweight and, therefore, have no interest in the sales price of the sugar products being marketed. Whether they are exclusive or general brokers, their services and methods of compensation are identical. The remaining 20 per cent of refined sugar and molasses not marketed by defendants or their brokers is sold to wholesalers for resale to industrial users and retail grocers. In addition, the

^{40/} The broker is not a separate step in the distribution from refiner to user in direct purchases nor from refiner to wholesaler, jobber, dealer, cooperative in indirect purchases. Thus, certain affidavits state in substance that purchases from defendants through a broker, whether general, exclusive or general line food, are purchases directly from defendants. When orders are placed with a broker, the invoice comes from the sugar company.

geographic marketing boundaries for sugar products are clear because they have been drawn by the sugar industry to include areas in which specific defendants sold and specific plaintiffs purchased refined sugar and molasses. Plaintiffs who are either doing business or residing within each territory purchased their sugar products in those territories from the defendants operating therein.

The decisional law with respect to this issue provides that class certification does not require that common questions be completely dispositive of a litigation as to all potential members of the class. Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969). In an unbroken line of decisions, courts have rejected arguments that various disparate facts relating to the claims of potential class members preclude a finding that common conspiracy issues predominate. For example, it has been recognized consistently that differences among potential class members concerning damages do not preclude class treatment so long as common questions regarding conspiracy and impact allegations predominate.

In re Master Key

Antitrust Litigation, ___ F. Supp. ___ (D. Conn. 1975); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), aff'd 409 F.2d 1239 (8th Cir. 1969); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967); In re Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

Therefore, for purposes of determining whether common questions of law and fact predominate, the focus of this Court should be principally on issues of liability. In re Master Key Antitrust Litigation, supra; Ungar v. Dunkin' Donuts of America, Inc., ___ F. Supp. ___ (E.D. Pa. 1975); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968). As Professor Moore has observed:

The most frequently recurrent types of suits brought under (b)(3) are private treble-damage antitrust suits, and actions based on various types of securities frauds. In both series of cases, courts as a rule approach the problem of predominance from the point of view of the severability of the issues of liability and damages--whether the asserted statutory violations can be effectively adjudicated in a class proceeding independent from the proceeding in which individual damages would be assessed. [Footnote omitted.] 3B J. MOORE, FEDERAL PRACTICE §23.45(2), at 23-758 (2d ed. 1974).

The requirement of predominant, common legal and factual questions only mandates the predominance of basic facts and laws, not that such questions be dispositive of an action. Siegel v. Chicken Delight, Inc., supra.

It is the allegedly unlawful horizontal price-fixing arrangement among defendants that, in its broad outlines, comprises the predominating, unifying common interest as to these purported plaintiff representatives and all potential class members. Hence, the existence, implementation and effect of this alleged conspiracy upon refined sugar and molasses prices are the central issues for each class proposed within each of the three geographic territories; the evidence to be presented by the plaintiff representatives on these elements will be the same as that which would otherwise have to be introduced by the absent class members in each territory, to establish liability.

Gold Strike Stamp Co. v. Christensen, 406 F.2d 791 (10th Cir. 1970); Research Corp. v. Pfizer Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969); Illinois v. Harper & Row Publishers, Inc., supra; Iowa v. Union Asphalt & Roadoils, Inc., supra; In re Ampicillin Antitrust Litigation, supra; City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971); Sol S. Turnoff Drug Distributors Inc. v. N.V. Nederlandsche, etc., 51 F.R.D. 227 (E.D. Pa. 1970); Minnesota v. United States Steel Corp., supra; Philadelphia Electric Co. v. Anaconda American Brass Co., supra.

(a) The issue of "conspiracy"

Concerning the existence of an alleged conspiracy, it will not be necessary, contrary to defendants' contention, to analyze each defendant and potential class member's transactions separately to establish liability. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); Illinois v. Harper & Row Publishers, Inc., supra; Siegel v. Chicken Delight, Inc., supra; In re Ampicillin Antitrust Litigation, supra; City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa. 1970); Contract Buyers League v. F. & F. Investment, 300 F. Supp. 210

(N.D. Ill. 1969), aff'd sub nom., Baker v. F.&F. Investment, 420 F.2d 1191 (7th Cir. 1970), cert. denied, 400 U.S. 821 (1970); Minnesota v. United States Steel Corp., supra; Philadelphia Electric Co. v. Anaconda American Brass Co., supra. If, as plaintiffs allege, the pricing mechanisms utilized by defendants were established conspiratorially, then that conduct is unlawful per se under section one of the Sherman Act.

(b) The issue of "impact"

The core of operative facts in this litigation includes not only the specific overt conspiratorial acts of defendants, but also the effect of such acts on the basic market price structure in the sugar industry. Concentration in this industry, the fungibility of defendants' product and inelastic demand governed the Market in which potential class members had to purchase refined sugar. The effect of diminished competition, if any, on the sugar marketplace is a matter common to all concerned, therefore, the requirements of "impact," also referred to as "causation," "fact of damage" and "fact of injury," is a common factual and legal question that predominates over any individual issues. In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973); Plintkote Co. v. Lysfiord, 246 F.2d 368 (9th Cir. 1957); In re Master Key Antitrust Litigation, supra.

The impact requirement is satisfied by demonstrating that a conspiracy in fact resulted in an overcharge that was "passed-on," at least in part, to all claimants. Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969); In re Ampicillin Antitrust Litigation, supra; Philadelphia Electric Co. v. Anaconda American Brass Co., supra. The fact of purchase during the period of price tampering establishes sufficient injury to business or property to create liability: City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 67 (D.N.J. 1971).

Hence, defendants are in error when they contend that each plaintiff and purported class member in any price-fixing action must prove that he absorbed at least some portion of the alleged overcharges as an essential element in establishing liability before any questions as to the amount of damages are reached.

In re Western Liquid Asphalt Cases, supra at 200-01.

the Ninth Circuit held that apportionment of damages may be treated after liability is established and placed the burden of proof to demonstrate an absorption of the overcharge on the intermediary party.

Even in a litigation such as this, which could involve millions of claimants, the impact element necessitates only an illustration of generalized injury. In re Western Liquid Asphalt Cases, supra; Union Carbide & Carbon Corp. v. Nisely, 300 F.2d 561 (10th Cir. 1961); Bray v. Safeway Stores, Inc., 392 F. Supp. 851 (C.D. Cal. 1975); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Iowa v. Union Asphalt & Roadcoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968); Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n, 66 F.R.D. 581 (E.D. Pa. 1975); Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975); Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35 (S.D.N.Y. 1974); In re Ampicillin Antitrust Litigation, supra; Mainwright v. Kraftco Corp., 54 F.R.D. 532 (N.D. Ga. 1972); City of Philadelphia v. American Oil Co., supra; Philadelphia Electric Co. v. Anaconda American Brass Co., supra. In federal antitrust civil actions, federal circuit and district courts have held that impact will be presumed once a plaintiff demonstrates the existence of an unlawful conspiracy that had the effect of stabilizing, maintaining or establishing product prices beyond competitive levels. Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), cert. denied, 361 U.S. 961 (1960); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), cert. denied, 377 U.S. 993 (1964); Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Corp., 264 F.2d 602 (9th Cir. 1958).

The inference of impact is a question common to all class members and is separable from individual issues of actual damage. In re Master Key Antitrust Litigation, supra; Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n, supra; Barr v. WUI/TAS, Inc., supra. Although some variances may have existed among defendants' alleged course of conduct and the types of practices employed by each at various times to effectuate the allegedly illegal price-fix, defendants' conduct in toto was responsible for an allegedly uninterrupted manipulation of the price of refined sugar and molasses over the relevant period in the Market.

Defendants make much of the fact that each of them did not sell all types of sugar to all customers at all times in all geographic areas of the three territories. The law relating to conspiracies and class determinations in federal antitrust cases clearly does ^{not} give ^{however,} much credence to defendants' contention. If there is participation in a conspiracy and the conspiracy tampered with the price structure, that defendant is liable as a joint tortfeasor with his fellow conspirator. Wall Products Co. v. National Gypsum Co., 357 F. Supp. 832 (N.D. Cal. 1973); Washington v. American Pipe & Construction Co., 280 F. Supp. 802 (D. Hawaii 1968).

The Ninth Circuit decision in Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), is not inconsistent with the aforementioned decisions. The Court in Kline carefully pointed out that the thirty-two named defendants were sued as representatives of a 2,000-member defendants' class. The Kline plaintiffs argued that the very fact of membership in the Los Angeles Realty Board was sufficient to establish generalized antitrust liability as to the named defendants and the members of the defendant class, relying on the "membership/ratification/adherence" theory. The court pointed out that by relying only on such a theory of liability, each defendant and each individual broker in the 2,000-member defendants' class would be "... entitled to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or, perhaps, some other yet unknown defense." Id. at 233. The court then considered the question of the predominance of common questions only with regard to the 2,000 member defendant class. It concluded:

On the question of the defendants' [and the 2,000-member defendant class] illegal conduct, no adequate showing has been made that the questions of law or fact common to the members of the [defendant] class predominate over the questions affecting individual members. Id. at 233.

* * *

This trial must repeat itself with individual differences some 2,000 times as far as we can discern based on the pleadings before us now. Id. at 236.

In Kline the liability of the defendants was an inherently individual determination based on knowing participation in a trade association conspiracy and affecting individual contracts between purchasers and association members. The instant litigation, however, involves

a very limited number of named defendants, with no attempt to establish a defendants' class.

(c) The issue of "fraudulent concealment"

Defendants maintain that proof of fraudulent concealment can proceed on an individual basis only. If, as plaintiffs allege, a conspiracy existed and fraudulently was concealed by all the defendants throughout the course of the alleged conspiracy, proof of such averments will involve common questions of fact. Furthermore, defendants argue that each potential class member must demonstrate that he exercised due diligence in attempting to discover the alleged conspiracy. This contention ignores reality. Indeed, the logical extension of defendants' argument would be that no conspiracy could be the basis of a class action, since collusion against detection is inherent to a conspiracy. Antitrust violators could insulate themselves from the class action remedy by fraudulently concealing their actions. To encourage such collusion would clearly be against public policy. Nevertheless, assuming arguendo that the issue of fraudulent concealment is not common to all or most of the actions in this litigation, this question does not predominate over issues of a common nature.

(d) The issue of "damages"

One method of resolving defendants' contention that damage issues do not predominate and present irreconcilable management difficulties is to bifurcate this litigation and try all the common elements, and then, if necessary, conduct individual trials on the damage issue. This approach has been accepted by various federal courts.

Goldfarb v.

Virginia State Bar, 421 U.S. 773 (1975); In re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975); In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973); Illinois v. Bristol-Myers Co., 470 F.2d 1276 (D.C. Cir. 1972); Bray v. Safeway Stores, Inc., 392 F. Supp. 851 (C.D. Cal. 1975); Automobile Fleet Discount Cases, ___ F. Supp. ___ (N.D. Ill. 1974); Gardner v. Awards Marketing Corp., 55 F.R.D. 460 (D. Utah 1972); In re Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972). If it were otherwise, class actions under the federal antitrust laws would cease to exist. As the federal judiciary has recognized, "damages" is generally an individual question.

The bifurcation method does not resolve what appears to be a conflict between proof of individual damages and proof of common liability issues. Bifurcation merely delays resolution of the problem until a later date which, in effect, prohibits a court from affirmatively finding that the cause is manageable as a class action as required by Rule 23(b)(3)(D). However, if actual damages need be proved on an individual basis and if such determinations are so pervasive as to tax a court's resources to an intolerable degree, a court is constrained to deal with the damages problem at the outset in making its determination as to whether a class should be certified.

At this early point in this litigation, the court is aware of at least two possible procedures for the determination of damages sustained by the proposed consumer classes in this litigation; either (1) by an aggregate class-wide approach, or (2) through individualized evidence based on reliable and accepted statistical methods. Neither method creates problems of manageability in the proof of plaintiffs' damages nor does either of these methods of proof deny defendants the right to present relevant rebuttal evidence. With respect to damages determined on a class-wide basis, decisional law, including Ninth Circuit decisions, approves proof of injury by just and reasonable inferences where the facts and circumstances of a case necessitate such a method. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959) cert. denied 361 U.S. 961 (1960); Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Corp., 264 F.2d 602 (9th Cir. 1958); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931).

As to statistical proof of damage, while the number of purchases of refined sugar on a class-wide basis may be proved by data derived from defendants' sales records, the amount of damages suffered by plaintiffs as a consequence of defendants' alleged conspiracy may be developed in the aggregate by appropriate formulae presented by economists or through sophisticated sampling, polling and statistical techniques. The only requirement under the federal antitrust laws for

the utilization of such classwide proof is that any statistics or techniques employed must produce a reasonable estimate of total damages. Story Parchment Co. v. Patterson Parchment & Paper Co., supra. See also Bigelow v. RKO Radio Pictures, supra; In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

As to the admissibility of statistical proof of damages, Rule 703 of the Federal Rules of Evidence and the Advisory Committee note thereto clearly open the door to such data when properly compiled and presented. Also, courts within this circuit have dealt with such data since In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973).

This method of proving damages concededly is less than absolutely precise, but absolute precision has never been required in the proof of the amount of damages. Bigelow v. RKO Radio Pictures, supra. Finally, no reason exists in law or logic for applying a different standard on the basis that these actions are brought as classes, rather than as individual actions. The strong policies in favor of the enforcement of private treble-damage actions compel that the same standards apply whether the action is individual or on behalf of a class. The policy favoring enforcement of the antitrust laws dictates that all persons within the "target area" of the defendant's alleged conspiracy have a right to assert their damages. In re Western Liquid Asphalt Cases, supra at 200. This Circuit long ago stressed that the right to recover under the antitrust laws is not restricted to certain categories of claimants. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

In summary, then, common proof of the price overcharge is inherent in the established method for proof of damages in antitrust cases. The proper measure of damages in a price-fixing dispute is simply the difference between the actual price paid and what the price would have been absent the conspiracy. See, e.g., American Crystal Sugar Co. v. Mandeville Island Farms, 195 F.2d 622 (9th Cir. 1952). It is basic that a plaintiff may prove what the price would have been absent a conspiracy by reference to an actual price for the same or a related product at some other time or place, either when or where the conspiracy did not exist or was not fully implemented. Bigelow v. RKO Radio Pictures, supra; Story Parchment Co. v. Patterson Parchment & Paper Co., supra; Eastman Co. v. Southern Photo Co., 273 U.S. 359 (1927). See also Lanzilotti, "Problems of Proof of Damages in Antitrust Suits," 16 ANTITRUST BULLETIN 329 (1971).

The arguments that defendants in this litigation have advanced in opposition to plaintiffs' motion for class action determinations do not raise novel issues but are the same or similar contentions that have been made since the promulgation of the revised Rule 23 in 1966. For the court to approve defendants' position would be an emasculation of the vitality of the amended Rule in federal antitrust cases. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967)

- (2) "Superiority of a Class Action to Other Available Means for the Fair and Efficient Adjudication of the Controversy"

The other requirement of Rule 23(b)(3) -- that the class action device be superior to other available methods for the fair and efficient adjudication of the controversy -- includes the problem of "manageability," which encompasses the entire range of practical problems that may render a class action inappropriate. An abundance of authorities sustain the superiority of class actions in situations such as this for the efficient and expeditious disposition of a controversy affecting large numbers of purchasers relative to an allegedly price-fixed product, In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, *supra*, especially when those purportedly injured have no other viable method of recovery.

(Contract Buyers League v. F. & F. Investment, 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom.*, Baker v. F. & F. Investment, 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970); Siegel v. Chicken Delight, Inc., *supra*; Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968). Moreover, this litigation requires class action designations because of the unfeasibility of joinder of all potential claimants pursuant to Rules 19 and 20 of the Federal Rules of Civil Procedure.

The court has fully reviewed defendants' contentions regarding the management difficulties which might arise should a class action be certified and concludes they are mere speculation. There are a number of reasons for granting class action certification when only manageability difficulties are noted and perceived. Rule 23(c)(1) mandates that a district court shall determine the propriety of a class action "[a]s soon as practicable after the commencement of an action brought as a class action." Also to accord much weight to defendants' contentions would be to rule on the basis of pure speculation. If the management difficulties envisaged by defendants become a

reality this court has the power and the obligation under Rule 23 to decertify, modify or otherwise amend its class action order.

Moreover, denial of class certification because of conjured manageability problems is disfavored among both the courts and the legal commentators because a court refusing to certify a class action on the basis of vaguely perceived manageability obstacles is acting counter to the policy behind Rule 23, and without implementing its power and creativity in dealing flexibly with class actions as difficulties arise. See, e.g., Yaffe v. Powers, 454 F.2d 1362 (9th Cir. 1972); Manual for Complex Litigation, "Management Problems," Part I, §1.43 (rev. ed. 1973).

Given the sizes of the classes requested, the power of this Court to modify class definitions, if such proves necessary, and the ingenuity of this Court and counsel to solve administrative problems, if and when they arise, this Court is convinced that the class action technique is the superior method of adjudicating this litigation. See Manual for Complex Litigation, "Management Problems," Part I, §1.43 (rev. ed. 1973).

IV. CLASS DESIGNATIONS

The court hereby Orders the creation of the following classes to be represented by the plaintiffs and counsel specified in Appendix A to this Order. The classes below certified by the court have been taken from the classes proposed by plaintiffs as stated in pages 1-4, with certain modifications and deletions consistent with the court's decision.

I. Class One

A. Subclass One -- consisting of all industrial sugar users ^{41/} in the Chicago-West Territory who have purchased refined sugar in this area during the period from 1955 to the present;

B. Subclass Two -- consisting of all retail grocers ^{42/} in the Chicago-West Territory who have purchased refined sugar in this area during the period from 1955 to the present;

II. Class Two

A. Subclass One -- consisting of all industrial sugar users in the California-Arizona Territory who have purchased refined sugar in this area during the period from 1949 to the present;

B. Subclass Two -- consisting of all retail grocers in the California-Arizona Territory who have purchased refined sugar in this area during the period from 1949 to the present;

III. Class Three

A. Subclass One -- consisting of all industrial sugar users in the Intermountain-Northwest Territory who have purchased refined sugar in this area during the period from 1949 to the present;

B. Subclass Two -- consisting of all retail grocers in the Intermountain-Northwest Territory who have purchased refined sugar in this area during the period from 1949 to the present;

^{41/} Concerning the industrial sugar users for this and the following classes, such entities must have purchased refined sugar for use or incorporation in producing, manufacturing or processing foodstuffs, including beverages, for human or animal consumption, and must not have offered such sugar for resale as sugar. Restaurants included within this class shall be limited to those restaurants that are or were, during the relevant time, (a) members of the National Restaurant Association, the Foodservice and Lodging Institute, or their local affiliated organizations, or (b) franchisees or franchisors that are or were engaged in the business of franchising restaurants in one of the three sugar areas as it pertains to these respective class actions. Hospitals and health care institutions included within this class shall be limited to those identified in the American Hospital Association's annual directory, "Guide to the Health Care Field," or members of the Federation of American Hospitals.

^{42/} Concerning the retail grocers for this and the following classes, such entities need not have had gross annual sales in excess of a specified amount in any year during the relevant period of time.

IV. Class Four -- consisting of the State of California and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

V. Class Five -- consisting of the State of Illinois and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

VI. Class Six -- consisting of the State of Minnesota and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

VII. Class Seven -- consisting of the State of Oregon and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

VIII. Class Eight -- consisting of the State of Washington and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1965 to the present;

IX. Class Nine -- consisting of the State of Kansas and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

X. Class Ten -- consisting of the State of Colorado and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

XI. Class Eleven -- consisting of the State of Arizona and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

XII. Class Twelve -- consisting of the State of Wisconsin and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1949 to the present;

XIII. Class Thirteen -- consisting of the State of Indiana and all its cities, counties and other political subdivisions and public entities, including hospital and school districts, that have purchased refined sugar directly or indirectly during the period from 1955 to the present;

- XIV. Class Fourteen -- consisting of all persons or entities in the Chicago-West Territory, in the California-Arizona Territory and in the Intermountain-Northwest Territory who purchased refined sugar or molasses for industrial use in the manufacturing, compounding, formulating or mixing of animal feed and other agricultural products during the period from 1955 to the present; and
- XV. Class Fifteen -- consisting of all persons or entities in the Chicago-West Territory, in the California-Arizona Territory and in the Intermountain-Northwest Territory who directly or indirectly purchased refined sugar as non-industrial wholesalers during the period from 1949 to the present for eventual resale to retail consumers. ^{43/}

V. CLASS NOTICE

Individual notice has never been required to be given every possible member of every class certified. Rather, in construing the clear provisions of Rule 23(c)(2), courts have required individual notice to be given to every "identifiable" class member concurrently with substituted notice to the unidentifiable class members. Indeed, in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974), the United States Supreme Court stated:

We think the import of this language [of Rule 23(c)(2)] is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

In the litigation at bar, the majority of potential, non-governmental members in each class appear to be members of various trade associations who, in turn, maintain current membership lists and publish periodic trade journals. Other lists of business establishments are maintained by trade associations as well as by business service organizations. Similarly, the "Progressive Grocers Marketing Guide Book" and the "Thomas Grocery Directory" are compilations by publishers who maintain exhaustive computerized lists of retail grocery stores. Together with other sources, such as defendants' refined sugar and molasses sales records, these various lists will facilitate individual notice to the

non-governmental class members who may desire to participate as such in this litigation. Plaintiffs are both willing and able and are hereby directed to provide notice to each possible class member either known to them or identifiable through reasonable diligence.

^{43/}

Excluded from these fifteen classes are (a) the defendants, their subsidiaries and affiliated business entities, and (b) each plaintiff who has instituted and presently maintains a non-class action.

In addition, due process mandates that to be sufficient, any notification technique in lieu of an actual mailing, must provide the maximum opportunity for notice to unidentifiable class members.

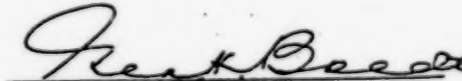
Mullane v. Central Hanover Bank & Trust Co.,

339 U.S. 306 (1950); Girsh v. Jenson, 521 F.2d 153 (3rd Circuit 1975).

The court hereby directs the designated class representatives, at their own expense and on behalf of their respective classes, to exert every reasonable effort to identify the name and address of every class member and, thereafter, to provide those class members with individual notice of the pendency of this litigation. As to providing notice of this litigation to unascertainable class members, the court favors some form of notice by publication but will reserve ruling thereon until fully apprised of all the facts and circumstances pertaining thereto.

On or before ^{44/} _____ counsel for the class representatives shall file and serve a single proposed form of class notice including a method for notifying unascertainable class members of this litigation. On or before _____ counsel for defendants may file and serve a consolidated memorandum of objections to or modifications of the Notice proposed by plaintiffs. On or before _____ counsel for the class representatives may file and serve a reply memorandum.

IT IS SO ORDERED this 20th day of May, 1976.


GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

^{44/} Dates for submission of proposed class notice and opposition and comments thereto will be entered in the spaces provided at the Pretrial Conference in San Francisco on May 24, 1976.

Plaintiff Class Representatives	Transferee District Civil Action Number	Counsel for Plaintiff Class Representatives
Owens Enterprises, Inc. The Brothers Restaurants, Inc.	C75-0503-GHB C75-1606-GHB	Robert Paul A. Samuel H. Seymour Law Office, Dixey, Tydings, Danzon, Y. Gordon Garon, Brainer & McNeely Anderson, Granger, Nagels & Lastelle Sloan, Bregiel & Connelly, P.C. M. Robert Stoll Furth, Fahrner & Wong Furth, Fahrner & Wong
Steak-O-Rama, Inc. Sarda Brothers Dairy, Inc. Ichwan's Sales Enterprises, Inc. International Kings Table Eng-Skell Company Mother's Cake & Cookie Co.	C75-1674-GHB C75-1696-GHB C75-2437-GHB C75-2564-GHB C75-2689-GHB C75-1404-GHB	
International Industries	C75-1910-GHB	Kendrick and Subkow Kohn, Savett, Marlon & Graf, P.C. Simons, Ritchie and Segal
Subclass B: Retail Grocers Treasure Island Foods, Inc. Courtney Food Mart, Inc.	C75-1127-GHB C75-2247-GHB	Freeman, Freeman & Atkins, Ltd. Schliffkin & Berman

CENTRAL DISTRICT OF CALIFORNIA

NORTHERN DISTRICT OF CALIFORNIA

APPENDIX A

Plaintiff Class Representatives	Transferee District Civil Action Number	Counsel for Plaintiff Class Representatives
CLASS ONE: (Chicago-West Territory) Subclass A: Industrial Users		
Genesla Group, Inc. Superior Beverage Company Bald Candy Company Reinmann's Inc.	C75-1120-GHB C75-1121-GHB C75-1122-GHB C75-1123-GHB	Lawrence Walner Specks & Goldberg, Ltd. Roan & Grossman Torshen, Portes & Elger, Ltd. Ginsberg & Ginsberg Much, Shellist, Freed, Dennenberg & Ament Sloan, Bregiel & Connelly, P.C. Kohn, Savett, Marlon & Graf, P.C. Ross, Hardies, O'Keefe, Babcock & Parsons Bachnoft, Schrage, Jones & Weaver Kendrick and Subkow, Barry Kroll Kohn, Savett, Marlon & Graf, P.C. Robert D. McHugh
Plantation Baking Company, Inc. Slon Industries, Inc. Home Juice Company Shulze and Burch Biscuit Co.	C75-1125-GHB C75-1126-GHB C75-1128-GHB C75-1554-GHB	
Grist Mill Co. Bresler Ice Cream Co. Goelitz Confectionary Co.	C75-1555-GHB C75-1908-GHB C76-0113-GHB	
Wilford Canning Co. Tyl-R Vending Service Bethness Greenleaf, Inc.	C75-2025-GHB C75-2026-GHB C75-2027-GHB	Ross, Hardies, O'Keefe, Babcock & Parsons Sloan, Bregiel & Connelly, P.C. Sloan, Bregiel & Connelly, P.C.
Blums of San Francisco, Inc.	C75-0117-GHB	Cooper & Seapullia Hawkins, Cooper, Pecherar & Ludvigson

NORTHERN DISTRICT OF CALIFORNIA

Plaintiff Class Representatives	Transfer District Civil Action Number	Counsel for Plaintiff Class Representatives
Subclass B: Retail Grocers		
<u>NORTHERN DISTRICT OF CALIFORNIA</u>		
Baley's Inc. Food Mart-Eureka	C75-0041-GHB C75-0504-GHB	Law Offices of Guido Savari Petty, Andrews, Tufts & Jackson
<u>CLASS THREE: (Intermountain-Northwest Territory)</u>		
<u>Subclass A: Industrial Users</u>		
<u>NORTHERN DISTRICT OF CALIFORNIA</u>		
Owens Enterprises, Inc. Armand's Inc. Eng-Skeill Company Mother's Cake & Cookie Co.	C75-0505-GHB C75-2561-GHB C75-2689-GHB C75-1404-GHB	Robert J. Gelhaus Paul A. Basline N. Robert Stoll Furth, Fahrner & Wong Furth, Fahrner & Wong
<u>CENTRAL DISTRICT OF CALIFORNIA</u>		
International Industries	C75-1911-GHB	Kendrick and Subkov Kohn, Savett, Marlon & Graf, P.C. Simmons, Ritchie and Segal
<u>Subclass B: Retail Grocers</u>		
<u>NORTHERN DISTRICT OF CALIFORNIA</u>		
Food Mart-Eureka John's Food Centers, Inc.	C75-0504-GHB C75-1824-GHB	Petty, Andrews, Tufts & Jackson Robert J. Gelhaus Paul A. Basline

Plaintiff Class Representatives	Transfer District Civil Action Number	Counsel for Plaintiff Class Representatives
<u>CLASS TWO: (California-Arizona Territory)</u>		
<u>Subclass A: Industrial Users</u>		
Grist Mill Co. Bald Candy Company	C75-1555-GHB C75-1122-GHB	Sachnoff, Schreager, Jones & Weaver Roan & Grossman
<u>NORTHERN DISTRICT OF ILLINOIS</u>		
Sun Garden Packing Company Eng-Skeill Company Tim's Restaurants Paoli's Restaurants, Inc. Fantasia Confections, Inc. Blums of San Francisco, Inc.	C74-2687-GHB C74-2689-GHB C74-2698-GHB C74-2711-GHB C75-0117-GHB	Law Offices of Joseph L. Alloto Furth, Fahrner & Wong Law Offices of David B. Gold Law Offices of Joseph L. Alloto
Owens Enterprises, Inc. Mother's Cake & Cookie Co. International Kings Table	C75-0505-GHB C75-1404-GHB C75-1555-GHB	Hawkins, Cooper, Pechoror & Ludvigson Cooper & Scarpulla Robert J. Gelhaus Paul A. Baseline Furth, Fahrner & Wong N. Robert Stoll
<u>CENTRAL DISTRICT OF CALIFORNIA</u>		
-Ing Kelly Marmalade Company General Bottlers, Inc. International Industries	C75-1545-GHB C75-1546-GHB C75-1909-GHB	Kendrick & Subkov Kohn, Savett, Marlon & Graf, P.C. Kendrick & Subkov Kohn, Savett, Marlon & Graf, P.C. Kendrick & Subkov Kohn, Savett, Marlon & Graf, P.C.
<u>SOUTHERN DISTRICT OF CALIFORNIA</u>		
Scandia Bakery	C75-1424-GHB	Buntington, Bryans, Harper, Burney & Newman-Crawford

Plaintiff Class Representatives	Transferee District Civil Action Number	Counsel for Plaintiff Class Representatives
CLASS ELEVEN: (Arizona governmental entities) State of Arizona	<u>DISTRICT OF ARIZONA</u> C75-2581-CMB	Attorney General for the State of Arizona
CLASS TWELVE: (Wisconsin governmental entities) State of Wisconsin	<u>NORTHERN DISTRICT OF CALIFORNIA</u> C75-2480-CMB	Attorney General for the State of Wisconsin Johnson, Sands, Lasee, Fricker & Sprenger, P.A.
CLASS THIRTEEN: (Indiana governmental entities) State of Indiana	<u>NORTHERN DISTRICT OF CALIFORNIA</u> C75-214-CMB	Attorney General for the State of Indiana Freeman, Rothe, Freeman & Salzman
CLASS FOURTEEN: (Agricultural Users) Seeco, Inc.	<u>DISTRICT OF MINNESOTA</u> C75-1131-CMB	Chestnut, Brooks & Burdard Cochrane & Brennan, P.A. Anderson, Granger, Nagels & Lastelle
Donald Bros., Inc.	C75-1455-CMB	Chestnut, Brooks & Burdard Cochrane & Brennan, P.A. Anderson, Granger, Nagels & Lastelle
Missouri Farmers Association, Inc.	C75-1808-CMB	Chestnut, Brooks & Burdard Cochrane & Brennan, P.A. Anderson, Granger, Nagels & Lastelle

Plaintiff Class Representatives	Transferee District Civil Action Number	Counsel for Plaintiff Class Representatives
CLASS FOUR: (California governmental entities) State of California	<u>NORTHERN DISTRICT OF CALIFORNIA</u> C75-1401-CMB	Attorney General for the State of California
CLASS FIVE: (Illinois governmental entities) State of Illinois	<u>NORTHERN DISTRICT OF ILLINOIS</u> C75-1174-CMB	Attorney General for the State of Illinois Freeman, Rothe, Freeman & Salzman
CLASS SIX: (Minnesota governmental entities) State of Minnesota	<u>DISTRICT OF MINNESOTA</u> C75-1458-CMB	Attorney General for the State of Minnesota Johnson, Sands, Lasee, Fricker & Sprenger, P.A.
CLASS SEVEN: (Oregon governmental entities) State of Oregon	<u>DISTRICT OF OREGON</u> C75-1441-CMB	Attorney General for the State of Oregon
CLASS EIGHT: (Washington governmental entities) State of Washington	<u>WESTERN DISTRICT OF WASHINGTON</u> C75-1173-CMB	Attorney General for the State of Washington
CLASS NINE: (Kansas governmental entities) State of Kansas	<u>DISTRICT OF KANSAS</u> C75-2350-CMB	Attorney General for the State of Kansas Crane, Martin, Clausen, Hamilton & Barry
CLASS TEN: (Colorado governmental entities) State of Colorado	<u>DISTRICT OF COLORADO</u> C75-1931-CMB	Attorney General for the State of Colorado

Plaintiff Class
Representatives
CLASS FIFTEEN: (Non-Industrial Wholesalers)
CPS Continental - Los Angeles, Inc.
United A. G. Cooperative

Transferee District
Civil Action Number
NORTHERN DISTRICT OF CALIFORNIA
C75-1122-GHB
C75-1117-GHB

Counsel for
Plaintiff Class Representatives
Friedman & Koven
Law Offices of John M. Boone
Storrie & Rosenblum
White, Lipp, Simon & Powers

PRETRIAL ORDER NO. 1

ORIGINAL
FILED

JUL 24 1975

WILLIAM L. WHITTAKER
CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION) Master File No.
)
) MDL 201

THIS DOCUMENT RELATES TO:
ALL ACTIONS

BALDI CANDY COMPANY,)
)
) Plaintiff,)
)
) v.) No. C75 1122 GHB
)
) GREAT WESTERN SUGAR COMPANY,)
)
) et al.,)
)
) Defendants.)

BLUMS OF SAN FRANCISCO,)
)
) INC., et al.,)
)
) Plaintiffs,)
)
) v.) No. C75 0117 GHB
)
) CALIFORNIA AND HAWAIIAN)
)
) SUGAR COMPANY, et al.,)
)
) Defendants.)

1	BOARD OF EDUCATION OF THE CITY OF BERKELEY,	
2	Plaintiff,	
3		
4	v.	No. C75 0782 GHB
5	CALIFORNIA AND HAWAIIAN SUGAR COMPANY, et al.,	
6	Defendants.	
7	STATE OF CALIFORNIA,	
8	Plaintiff,	
9		
10	v.	No. C75 1401 GHB
11	CALIFORNIA AND HAWAIIAN SUGAR COMPANY, et al.,	
12	Defendants.	
13	ENG-SKELL COMPANY,	
14	Plaintiff,	
15		
16	v.	No. C74 2689 GHB
17	CALIFORNIA AND HAWAIIAN SUGAR COMPANY, et al.,	
18	Defendants.	
19	EWALD BROS., INC.,	
20	Plaintiff,	
21		
22	v.	No. C75 1455 GHB
23	GREAT WESTERN SUGAR COMPANY, et al.,	
24	Defendants.	
25	FANTASIA CONFECTIONS, INC.,	
26	Plaintiff,	
27		
28	v.	No. C74 2727 GHB
29	UTAH-IDAHO AND CALIFORNIA AND HAWAIIAN SUGAR COMPANY,	
30	Defendant.	
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1	FANTASIA CONFECTIONS, INC.,	
2	Plaintiff,	
3		
4	v.	No. C74 2728 GHB
5	CALIFORNIA AND HAWAIIAN SUGAR COMPANY, et al.,	
6	Defendants.	
7	FOOD MART-EUREKA, et al.,	
8	Plaintiffs,	
9		
10	v.	No. C75 0504 GHB
11	CALIFORNIA AND HAWAIIAN SUGAR COMPANY, et al.,	
12	Defendants.	
13	GENERAL BOTTLERS, INC.,	
14	Plaintiff,	
15		No. C75 1546 GHB
16	v.	
17	CALIFORNIA AND HAWAIIAN SUGAR COMPANY, et al.,	
18	Defendants.	
19	GENESIS GROUP, INC., et al.,	
20	Plaintiffs,	
21		
22	v.	No. C75 1120 GHB
23	GREAT WESTERN SUGAR COMPANY, et al.,	
24	Defendant.	
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1	GRIST MILL CO.,	
2	Plaintiff,	
3	v.	No. C75 1655 GHB
4	GREAT WESTERN SUGAR	
5	COMPANY, et al.,	
6	Defendants.	
7	HEINEMANN'S INC., an	
8	Illinois corporation,	
9	et al.,	
10	Plaintiffs,	No. C75 1123 GHB
11	v.	
12	GREAT WESTERN SUGAR	
13	COMPANY, et al.,	
14	Defendants.	
15	HOME JUICE COMPANY,	
16	et al.,	
17	Plaintiffs,	
18	v.	No. C 75 1128 GHB
19	GREAT WESTERN SUGAR	
20	COMPANY, et al.,	
21	Defendants.	
22	ILLINOIS, STATE OF,	
23	Plaintiff,	
24	v.	No. C75 1124 GHB
25	GREAT WESTERN SUGAR	
26	COMPANY, et al.,	
27	Defendants.	

1	ITT CONTINENTAL BAKING	
2	COMPANY,	
3	Plaintiff,	No. C75 1543 GHB
4	v.	
5	CALIFORNIA AND HAWAIIAN SUGAR	
6	COMPANY, et al.,	
7	Defendants.	
8	ITT CONTINENTAL BAKING	
9	COMPANY,	
10	Plaintiff,	No. C75 1544 GHB
11	v.	
12	GREAT WESTERN SUGAR	
13	COMPANY, et al.,	
14	Defendants.	
15	KING KELLY MARMALADE	
16	COMPANY, et al.,	
17	Plaintiffs,	No. C75 1545 GHB
18	v.	
19	CALIFORNIA AND HAWAIIAN	
20	SUGAR COMPANY, et al.,	
21	Defendants.	
22	MERCHANTS RESTAURANT, INC.,	
23	et al.,	
24	Plaintiffs,	No. C75 1553 GHB
25	v.	
26	GREAT WESTERN SUGAR	
27	COMPANY, et al.,	
28	Defendants.	

1	MINNESOTA, STATE OF,	
2	Plaintiff,	
3	v.	No. C75 1456 GHB
4	GREAT WESTERN SUGAR	
5	COMPANY, et al.,	
6	Defendants.	
7	MOTHER'S CAKE & COOKIE CO.,	
8	Plaintiff,	
9	v.	No. C75 1404 GHB
10	CALIFORNIA AND HAWAIIAN	
11	SUGAR COMPANY, et al.,	
12	Defendants.	
13	NORTHWEST CANDIES, INC.,	
14	Plaintiff,	
15	v.	No. C75 1454 GHB
16	UTAH-IDAHO SUGAR	
17	CO., et al.,	
18	Defendants.	
19	OREGON, STATE OF,	
20	Plaintiff,	
21	v.	No. C75 1441 GHB
22	UTAH-IDAHO SUGAR	
23	CO., et al.,	
24	Defendants.	
25	OWENS ENTERPRISES, INC.,	
26	et al.,	
27	Plaintiffs,	
28	v.	No. C75 0505 GHB
29	CALIFORNIA AND HAWAIIAN	
30	SUGAR COMPANY,	
31	Defendants.	
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1	PAOLI'S RESTAURANTS, INC.,	
2	et al.,	
3	Plaintiffs,	
4	v.	No. C74 2711 GHB
5	CONSOLIDATED FOODS	
6	CORPORATION, et al.,	
7	Defendants.	
8	PLANTATION BAKING COMPANY, INC.,	
9	et al.,	
10	Plaintiffs,	
11	v.	No. C75 1125 GHB
12	GREAT WESTERN SUGAR	
13	COMPANY, et al.,	
14	Defendants.	
15	RALEY'S INC., et al.,	
16	Plaintiffs,	
17	v.	No. C75 0041 GHB
18	CALIFORNIA AND HAWAIIAN	
19	SUGAR COMPANY, et al.,	
20	Defendants.	
21	SCANDIA BAKERY, a California	
22	partnership,	
23	Plaintiff,	
24	v.	No. C75 1424 GHB
25	CALIFORNIA AND HAWAIIAN	
26	SUGAR COMPANY, et al.,	
27	Defendants.	
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1	SCHULZE AND BURCH BISCUIT		
2	CO.,		
3	Plaintiff,		
4	v.	No. C75 1554 GHB	
5	GREAT WESTERN SUGAR		
6	COMPANY, et al.,		
7	Defendants.		
8	SEECO, INC., et al.,		
9	Plaintiffs,		
10	v.	No. C75 1131 GHB	
11	GREAT WESTERN SUGAR,		
12	et al.,		
13	Defendants.		
14	SUN GARDEN PACKING COMPANY,		
15	Plaintiff,		
16	v.	No. C74 2687 GHB	
17	CONSOLIDATED FOODS CORPORATION,		
18	et al.,		
19	Defendants.		
20	SUPERIOR BEVERAGE COMPANY,		
21	INC., et al.,		
22	Plaintiffs,		
23	v.	No. C75 1121 GHB	
24	GREAT WESTERN SUGAR		
25	COMPANY, et al.,		
26	Defendants.		
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1	TREASURE ISLAND FOODS, INC.,		
2	et al.,		
3	Plaintiffs,		
4	v.	No. C75 1127 GHB	
5	GREAT WESTERN SUGAR COMPANY,		
6	et al.,		
7	Defendants.		
8	WASHINGTON BEVERAGES, INC.,		
9	et al.,		
10	Plaintiffs,		
11	v.	No. C75 1130 GHB	
12	UTAH-IDAHO SUGAR		
13	COMPANY, et al.,		
14	Defendants.		
15	WASHINGTON, STATE OF,		
16	Plaintiff,		
17	v.	No. C75 1129 GHB	
18	UTAH-IDAHO SUGAR		
19	COMPANY, et al.,		
20	Defendants.		
21	ZIM'S RESTAURANTS,		
22	INC.,		
23	Plaintiff,		
24	v.	No. C74 2695 GHB	
25	UTAH-IDAHO SUGAR		
26	COMPANY,		
27	Defendant.		
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1 ZIM'S RESTAURANTS,
2 INC.,
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4 Plaintiff,
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6 v.
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8 CALIFORNIA AND HAWAIIAN
9 SUGAR COMPANY, et al.,
10
11 Defendants.
12

No. C74 2698 GHB

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14 ZION INDUSTRIES, INC., et al.,
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16 Plaintiff,
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18 v.
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20 AMALGAMATED SUGAR COMPANY,
21 et al.,
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23 Defendants.
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No. C75 1126 GHB

1 PRETRIAL ORDER NO. 1

2 Pursuant to several petitions filed by some of the
3 defendants in the above captioned cases with the Judicial
4 Panel on Multidistrict Litigation, assigned therein Docket
5 No. 201 and captioned "In Re Sugar Industry Antitrust
6 Litigation," the Judicial Panel, by its order of June 2,
7 1975, ordered that certain of the actions described in the
8 caption of this order which were pending in districts other
9 than the Northern District of California be transferred to
10 the Northern District of California pursuant to 28 U.S.C.
11 Section 1407, there to be consolidated or coordinated for
12 pretrial proceedings with those cases listed in the caption
13 of this order which already were pending in the Northern
14 District of California and all of such cases were thereby
15 assigned to George H. Boldt, District Judge for the Western
16 District of Washington, sitting by designation of the
17 Judicial Panel pursuant to 28 U.S.C. Section 292(b).

18 Thereafter, on June 16, 1975 the Judicial Panel
19 issued conditional transfer orders with respect to the
20 remainder of the actions listed in the caption of this order
21 directing their transfer as "tag-along" cases to the
22 Northern District of California and assignment to Judge
23 Boldt. No objections having been filed with respect to the
24 conditional transfer orders such actions are now effectively
25 transferred for coordinated or consolidated pretrial
26 proceedings pursuant to 28 U.S.C. Section 1407.

27 On June 16, 1975 the Judicial Panel issued an
28 Order to Show Cause to the parties involved in the action of
29 Milton W. Freedman et al., Plaintiffs v. Amalgamated Sugar
30 Company et al., Defendants (E.D. Penn. Civil No. 75-514)
31 proposing the transfer of that case to the Northern District
32 of California and its assignment to Judge Boldt for

1 coordinated or consolidated pretrial proceedings pursuant to
2 28 U.S.C. Section 1407. As of the date of this preliminary
3 pretrial conference no action has been had with respect to
4 the Order to Show Cause and neither the plaintiffs in that
5 case nor the majority of the defendants therein have appeared
6 at this preliminary pretrial conference.

7 At the Court's request, counsel for the parties
8 in 1812 Distributing Corporation, et al. vs. Utah-Idaho
9 Sugar Company, et al., Civil No. 633 - 72C2 in the Western
10 District of Washington, have attended this conference.

11 This pretrial conference has been held on July 8,
12 1975 in the Northern District of California at San Francisco.
13 All parties to the actions listed in the caption of this
14 order, together with counsel in the 1812 case, having appeared
15 at such conference by counsel, and the Court having heard
16 the proposals of such counsel, and due deliberation having
17 been given,

18 IT HEREBY IS ORDERED:
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I

ORDER OF COORDINATION

The actions listed in the caption of this cause,
together with the 1812 case, are coordinated for pretrial
purposes pursuant to the provisions of Title 28 U.S.C.
Section 1407. This order is made without prejudice to the
right of any party to apply for a severance and the Court
may subsequently sever any case or group of cases and direct
that such case or group of cases proceed separately.

II

MASTER DOCKET

A master docket is hereby established for the coordinated pretrial proceedings in all of the actions coordinated herein and in all other sugar antitrust cases filed in or transferred to this Court which shall be coordinated for pretrial purposes.

III

MASTER DOCKET AND SEPARATE ACTION FILES

The original of this order shall be filed by the Clerk in the Master Docket herein established. The Clerk shall establish a separate file for each action herein coordinated, giving each such action a file number in this District. The Clerk shall file a copy of this order in the separate files of each of the actions listed in the caption hereto and shall mail a copy of this order to counsel of record in each of those actions.

IV

NEWLY FILED OR TRANSFERRED ACTIONS

When an antitrust case relating to sugar is filed in this Court or transferred here from another court the Clerk of this Court shall:

A. File a copy of this order in the separate file for such action.

B. Send the following memorandum to Judge Boldt and to the coordinating counsel for the parties: "(Title of Court and Cause and File Number). The above entitled action, being an antitrust action relating to sugar, was this day filed (or transferred from the District Court of _____)." ."

C. Mail to the attorneys for the plaintiff in the newly filed or transferred case a copy of this order.

D. Upon the first appearance of any defendant mail to the attorneys for the defendant in such newly filed or transferred case a copy of this order.

(The Court requests the assistance of all counsel in calling to the attention of the Clerk of this Court the filing or transfer of any case which might properly be coordinated for pretrial purposes as a part of the sugar industry antitrust litigation.)

V

APPLICATION OF THIS ORDER TO
SUBSEQUENTLY FILED CASES

This and each subsequent order of this Court shall apply to each sugar industry antitrust case subsequently filed in this Court or transferred to this Court unless a party objecting to the coordination of such case or any other order made herein shall, within twenty (20) days after the date upon which a copy of this order is mailed by the Clerk to such party, file an application for relief from this order or any provision herein.

VI.

CAPTIONS OF CASES

A. Every document filed in these coordinated proceedings, or in any separate action included therein, shall bear the following caption:

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA.

In re Sugar Antitrust Litigation: Master File No. MDL 201.

THIS DOCUMENT RELATES TO:

B. When a paper is intended to be applicable to all actions to which this order is applicable, the words "All actions" shall appear immediately after the words "This document relates to:" in the caption set out above. When a paper is intended to be applicable only to some, but not all such actions, this Court's docket number for each individual action to which the paper is intended to be applicable shall appear immediately after the words "This document relates to:" in the caption described above.

VII.

FILING AND DOCKETING

A. A copy of each paper bearing the caption set forth in Paragraph VI above shall be filed by the Clerk in the Master Docket. Two copies of each paper so filed shall also be sent by the party filing the same to this Court addressed to the Honorable George H. Boldt, United States District Judge, P.O. Box 1993, Tacoma, Washington 98401. The copy filed with the Clerk shall bear a certification that the copies have been sent to the Judge as required by the preceding sentence.

B. When a paper is filed bearing the notation that it is applicable to "All actions," or to more than one action, the Clerk shall file such paper in the Master File and note such filing in the docket thereof. No further papers need be filed or docket entries made.

C. Where a paper is filed and the caption, pursuant to Paragraph VI above, shows that it is to be applicable to only one specific action, the Clerk shall file a copy of such paper in the Master File and in the file of the specific action to which the paper is intended to be applicable, and shall note such filing in the Master Docket and in the docket of such action. It shall be the responsibility of the party filing such paper to supply the Clerk with sufficient copies of any such paper to facilitate his compliance with the directions of this subparagraph. The Clerk shall not accept any document for filing unless provided with sufficient copies thereof to enable him to comply with the directions of this order.

VIII

FURTHER TRANSFER OR ASSIGNMENT OF ACTIONS

At such time as any of the actions coordinated hereunder is returned to the appropriate transferor court, or transferred to any other court, or is assigned to any department of this Court for trial, the record in such case shall be assembled from the Master File and the file unique to such action by the parties to such action, with the cost, if any, to be divided equally between the plaintiffs and the defendants in such action.

IX

RULES OF PROCEDURE

A. The Local Rules of the Northern District of California shall govern all further proceedings herein.

B. All motions shall be considered submitted upon conclusion of the briefing unless oral argument is requested by the court.

C. These consolidated proceedings and each of the actions subject hereto are designated as "complex litigation" and are subject to the Manual For Complex Litigation which shall serve as a guide to all further proceedings herein except as modified by the Court. Counsel may apply for any modification that is considered to be more appropriate or expeditious than procedures recommended in the manual.

ADMISSION OF ATTORNEYS

Each attorney not a member of the bar of this Court who is acting as counsel for a plaintiff or a defendant herein shall be deemed admitted pro hac vice to practice before this Court in connection with these proceedings.

AMENDMENTS TO PLEADINGS

On or before August 1, 1975, the plaintiffs in the actions listed in the caption hereof shall file all presently contemplated supplemental complaints or amendments to their complaints. The filing of any such supplemental or amended complaint shall not constitute a waiver of defendants' rights to object thereto on any basis provided by law, including, without limitation, any objections defendants would have had, had such filing been required by motion of plaintiffs pursuant to the provisions of Rule 15 of the Federal Rules of Civil Procedure, which rights, if any, are expressly reserved.

XII

ANSWERS AND MOTIONS ADDRESSED
TO COMPLAINTS

A. Defendants shall answer or otherwise move with respect to the complaints, including motions opposing the filing of supplemental complaints and motions to strike amendments to the complaints, on or before September 25, 1975. Defendants may, at their election, supersede any answer heretofore filed by filing a new answer as provided herein.

B. As to any newly filed or transferred case coordinated herewith, or as to any amended complaint, the defendants shall have until September 25, 1975 or 30 days from the filing or transfer of such case (whichever date is the later) in which to answer or otherwise move with respect to the complaint.

C. Any motions by the defendants made pursuant to paragraph XII A. above, shall be responded to by the plaintiffs within 30 days after the filing of such motions. The moving parties shall have 21 days thereafter in which to reply.

XIII

STEERING COMMITTEES

A. The attorneys of record for the plaintiffs shall constitute the plaintiffs' Committee of the Whole, and the attorneys of record for the defendants shall constitute the defendants' Committee of the Whole. The respective Committees of the Whole have met and selected Steering Committees to act on their behalf, as set forth below. The persons listed on Appendix A hereto are hereby appointed by the Court to serve on plaintiffs' steering committee.

The persons listed on Appendix B hereto are hereby appointed by the Court to serve on defendants' steering committee.

Plaintiffs' steering committee may be reconstituted or changed as may be appropriate from time to time.

B. The Steering Committee so selected is vested by the Court with the following responsibilities and duties:

- (1) To brief and argue motions and file opposing briefs in pretrial proceedings initiated by other parties;
- (2) To initiate and conduct discovery proceedings, including but not limited to, the preparation of joint written Interrogatories and Requests for the Production and Inspection of Documents;
- (3) To supervise the examination of witnesses in depositions and on oral interrogatories;
- (4) To select counsel to act as spokesman at pretrial conferences, subject to the right of any party to present individual or divergent positions where necessary;
- (5) To call meetings of counsel on their side when they deem it appropriate;

...

...

1 (6) To perform such other duties as
2 may be expressly authorized by
3 further Order of the Court.

4 C. The steering committees shall provide general
5 supervision and direction to the activities of counsel, and
6 shall delegate responsibilities to counsel as may be required.
7 The committee is expected to maintain communication and
8 promote a spirit of harmony with all counsel. In acting as
9 a spokesman for all counsel within their respective groups
10 in matters of joint and common action, other counsel will
11 have the right to be heard on matters not susceptible of
12 such joint or common action or in which genuine or substantial
13 disagreement exist among counsel. The Court, however,
14 disfavors the presentation of cumulative views or views
15 which differ insignificantly from the steering committees'.
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1 XIV

2 COORDINATING COUNSEL

3 A. Plaintiffs' and defendants' counsel have met
4 and selected their respective coordinating counsel, as
5 follows:

6 Josef D. Cooper, Secretary to
7 Plaintiffs' Steering Committee

8 Stephen V. Bomse, for defendants

9 The Court hereby appoints such counsel coordinating counsel
10 with the following responsibilities and duties:

11 (1) to receive orders and notices from the
12 Court and the Judicial Panel on Multidistrict Litigation on
13 behalf of all parties;

14 (2) to maintain a complete file with copies
15 of all documents served upon them, which file shall be
16 available to all parties;

17 (3) within ten days of this Order, to
18 compile and submit to the Court an up-to-date list of all
19 attorneys. The Court will thereafter direct service of a
20 copy of both lists on all counsel. Any attorney who wishes
21 to have his name added to or deleted from such service list,
22 or any future service list, may do so upon request to the
23 Clerk of this Court and notice to all other persons on such
24 service list. This list shall replace the service list
25 attached to the Opinion and Order of the Multidistrict Panel
26 dated July 2, 1975;

27 (4) coordinating counsel are not responsible
28 for and are not authorized to accept service on behalf of
29 any member of his group of any paper from any party. Any
30 party wishing to serve a paper on any other party may perfect
31 that service only by serving all attorneys for that party
32 designated on the effective service list.

PRESERVATION OF DOCUMENTS

A. All parties herein and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from destroying, or causing the destruction of, or permitting the destruction of, any relevant documents or other relevant items, except upon prior approval of the Court obtained by application showing cause therefore, with notice to all other parties of such application providing them an opportunity to be heard by the Court as to the merits of the application. For the purposes of this paragraph, the phrase "permitting the destruction of" refers to documents under any party's care, custody or control. Furthermore, for the purposes of this paragraph, the phrase "any relevant document or other relevant item" shall be deemed to refer to any document or other item described or referred to in the requests for production of documents heretofore filed by any party and to any other document or item which appears to constitute evidence or to contain information relevant to any issue raised by any of the pleadings in these actions. Counsel for plaintiffs and defendants are directed to meet as may be necessary and attempt to determine documents or categories of documents which need not be preserved pursuant to this paragraph. If counsel are unable to agree, any party may apply to the Court for relief from this order upon reasonable notice. Any document or other item described or referred to in any subsequent discovery request hereafter made by any party to another party herein shall thereafter be presumptively deemed to be a relevant document or item for purposes of

this paragraph only.

B. Plaintiffs and Defendants shall meet and resolve the location of a depository for documents produced; the times during which parties may inspect said documents; and the method of numbering documents for identification purposes. The document depository shall be located in San Francisco, California at such location as shall be mutually agreeable to the parties.

C. This order respecting preservation of documents supersedes any prior order, agreement or stipulation heretofore made in any of the cases which are subject to this Pretrial Order No. 1.

XVI

CLASS DETERMINATION

On or before September 8, 1975, plaintiffs shall file their motions and supporting briefs for certification of the requested classes. To the extent possible, such motion shall be filed on a joint and consolidated basis, and shall eliminate conflict or overlap between the classes plead in the complaints.

On or before October 10, 1975, defendants shall file any answering brief to plaintiffs' class action motions, including any discovery requests defendants may deem appropriate to the resolution of this issue, and on or before October 20, 1975, plaintiffs shall file their reply brief. For good cause shown, defendants may petition the Court for an extension beyond October 10, 1975 for filing their answering brief.

XVII

GRAND JURY DOCUMENTS

A. Plaintiffs have requested this Court to enter an order requiring defendants to deposit for plaintiffs' examination copies of all documents previously produced by them to a grand jury or to the Federal Trade Commission at any time subsequent to January 1, 1968 (regardless of the date of the documents produced or the time period to which said documents relate) whether pursuant to subpoena, civil investigative demand, voluntarily, or otherwise, relating to alleged antitrust violations in the sugar industry. Defendants oppose this request.

B. On or before August 5, 1975, defendants shall file their memorandum in opposition to the production of the documents noted in paragraph XVII A. above. On or before August 12, 1975, plaintiffs shall file their answering brief, and on or before August 19, 1975, defendants shall file their reply brief.

XVIII

DISCOVERY

Plaintiffs and defendants have submitted alternate discovery schedules to the Court for its consideration. Counsel are directed to meet and attempt to resolve a mutually satisfactory schedule. If counsel are unable to agree, plaintiffs and defendants shall file their proposals, together with supporting memoranda, on or before August 15, 1975.

XIX

PROTECTIVE ORDER

Counsel are directed to meet and attempt to resolve mutually agreeable language for a protective order establishing the confidential nature of documents produced in the course of these proceedings. If counsel are unable to agree, plaintiffs and defendants shall file their proposals, together with supporting memoranda, on or before August 8, 1975.

EMERGENCY ORDERS

If by reason of some emergency where special orders are required with respect to discovery the parties may, in writing addressed to the Judge presiding in this case, with a copy to coordinating counsel on the other side, advise the Court of the nature of the emergency and of the requested relief. The Court will then communicate with the parties and make such disposition of the matter as seems to be appropriate. Apart from such emergencies, communications by letter with the Court will be viewed with disfavor.

PROCEDURE AS TO DISCOVERY

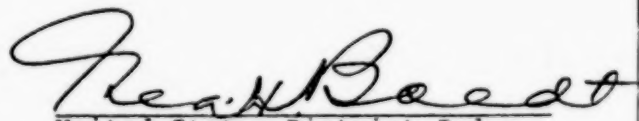
Objections to discovery or motions to compel discovery will not be heard unless the moving party certifies that he has requested an informal conference with opposing counsel and, if the request is granted, has made a good faith attempt to resolve differences insofar as possible without court intervention. Opposing counsel shall respond to such requests reasonably and in good faith.

NEXT PRETRIAL CONFERENCE

The next pretrial conference shall be held on a date to be fixed by the Court. At this conference the parties shall present to the Court their view regarding a proposed schedule for completion of pretrial proceedings, and possible trial settings. During the interim between pretrial conferences, Coordinating Counsel shall submit periodic written status reports to the Court. During this interim, the Court will conduct conference telephone calls with counsel as may be necessary to resolve pending matters and insure the steady progress of this litigation.

DATED:

7/24/75


United States District Judge
Northern District of California

PLAINTIFFS' STEERING COMMITTEE

Robert S. Atkins
Joseph L. Alioto
Maxwell M. Blecher
Thomas L. Boeder
John E. Burke
John A. Cochrane
Howard M. Downs
William H. Ferguson - Chairman
Lee A. Freeman
Frederick P. Furth
David B. Gold
Perry Goldberg
J. Nathaniel Hamrick
Elwood Kendrick
Harold E. Kohn
Richard N. Light
Albert R. Malanca
Guido Saveri
Jerome H. Torshen

DEFENDANTS' STEERING COMMITTEE

Marvin J. Bertoch
Stephen V. Bomse - Chairman
Rayner H. Hamilton
James F. Kirkham
Bailey Lang
James Madison
Bruce Montgomery
Robert D. Raven

RECEIVED
AUG 26 1976
COOPER & SCARPULLA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION

Master File No.

MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS

PRETRIAL ORDER NO. 12
RE: FORMS OF
CLASS NOTICE

On May 20, 1976, this Court issued its Opinion and Order certifying certain of the actions herein to be maintained as class actions on behalf of the members thereof, as more fully set forth in said Opinion and Order and subsequent Orders relating thereto. Requests for certification for appeal under 28 U.S.C. §1292(b) and for rehearing have been denied by Order of Court.

Pursuant to the Court's May 20 Order, the parties have submitted their positions and proposals, together with memoranda in support thereof, with respect to the form of notice to class members required by Rule 23, and related matters, and a hearing and opportunity for oral argument with respect thereto was afforded to all interested parties on August 16, 1976, as supplemented by any written submission thereafter. The Court has considered said positions, proposals, memoranda and argument.

1 The Court has been advised further with respect to a
2 certain settlement agreement entered into by the class
3 representatives of certain Industrial-user, Retail Grocer
4 and Wholesaler classes on behalf of the members of their
5 classes and individual plaintiffs, with certain of the
6 defendant sugar companies, namely, Holly Sugar Corporation
7 (hereinafter Holly), Union Sugar Division - Consolidated
8 Foods Corporation (hereinafter Union), and California and
9 Hawaiian Sugar Company (hereinafter C & H), a copy of which
10 settlement agreement (dated July 2, 1976) was lodged with
11 the Clerk of the Court on August 17, 1976. Prior thereto the Court had not
12 learned the contents of the settlement agreements in any manner whatever.
13 Plaintiffs have petitioned the Court to authorize submission
14 of the proposed settlement to the affected classes. The
15 Court has reviewed the said settlement agreement and considered
16 the comments, both written and oral, of all parties concerning
17 notice thereof, including any written submission made after
18 August 17, 1976, and has preliminarily and tentatively
19 determined that the settlement agreement is substantial, and
20 sufficiently fair, reasonable, and adequate to authorize and
21 require submission of the proposed settlement to the members
22 of the respective classes and the individual plaintiffs.

23 It is hereby accordingly ORDERED as follows:

24 I. The Court finds and determines that the forms
25 of class notices attached hereto as Exhibits A (for the
26 Industrial-user, Retail Grocer and Wholesaler Classes), B
27 (for the Agricultural Molasses User Class), and C (for the
28 Governmental Body Classes), satisfy the notice requirements
29 of Rule 23(c)(2) of the Federal Rules of Civil Procedure,
30 and the requirements of appropriate notice under Rule 23(e).
31 with respect to Exhibit A for the proposed Holly, Union and
32 C & H settlement, as to the content of such forms, and

1 should be distributed to class members in accordance with
2 the procedure more fully set forth herein and in subsequent
3 Orders of the Court relating thereto.

4 II. Plaintiffs shall compile for each class a
5 list of class members to be used in disseminating mailed
6 notice to class members in each of the classes, and shall
7 file a proposal with the Court specifying the sources to be
8 used in giving notice within 10 days from the date of this
9 Order, and serve copies of the same upon all interested
10 counsel of record. Such sources may include:

11 (A) lists of purchasers in the possession,
12 custody and control of defendants, which lists shall be
13 furnished to plaintiffs by defendants within 15 days
14 from the date of this Order, or within such longer
15 period of time as may be agreed to or ordered by
16 the Court. To the extent that defendants maintain
17 such lists on computer, they shall produce such lists
18 in machine readable form, and provide plaintiffs with
19 such technical information or explanation as may be
20 necessary;

21 (B) notice lists in other class action
22 litigation which include persons who are members of the
23 classes to whom notice is to be sent herein;

24 (C) relevant trade association membership
25 lists;

26 (D) lists of governmental entities; and

27 (E) such other sources as plaintiffs may
28 deem appropriate.

29 Plaintiffs shall also file and serve at the same time a list
30 of publications in which notice is proposed to be advertised.

31 . . .

32 . . .

1 III. Within 5 days after filing and service of the
2 aforesaid proposal with respect to the identification of
3 class members and list of publications, parties objecting to
4 the same shall file and serve their comments in writing with
5 the Court.

6 IV. The Court, after consideration of plaintiffs'
7 proposal with respect to identification of class members and
8 list of publications, and any objections thereto, will
9 determine whether further hearing is necessary and will
10 issue such Order as shall be appropriate with respect to the
11 compilation of the names of persons to whom individual
12 notice shall be directed and such publication, if any, as
13 may be proper, the provisions of such Order to be carried
14 out by plaintiffs at their sole expense, except as may be
15 otherwise provided.

16 V. Plaintiffs, in coordination with the Clerk of
17 Court, at their expense, except as may be otherwise provided,
18 shall arrange for the leasing of numbered post office boxes
19 in San Francisco of adequate size for the receipt of responses
20 to each of the respective notices, to be leased promptly
21 upon the issuance of the Court's further Order; referred to
22 in Paragraph IV above.

23 VI. Plaintiffs shall arrange to receive, record
24 and keep in appropriate central locations, by class, all
25 responses to the notices and shall serve and file reports
26 with respect thereto promptly with the Court.

27 VII. A Settlement Committee is hereby appointed
28 for the purpose of administering the proposed settlements,
29 consisting of:

30 (A) those members of the Plaintiffs'

31 Executive Committee who represent settling class

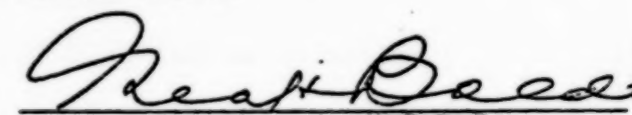
32 . . .

1 representatives or individual plaintiffs, together
2 with such other counsel as shall be designated by
3 that Committee, and

4 (B) counsel for the three settling
5 defendants.

6 VIII. All objections, if any, to the proposed
7 settlement shall be forthwith delivered to the Settlement
8 Committee which shall cause two copies of each to be delivered
9 to the Court, one copy to be filed in the Clerk's Office,
10 and a copy shall be provided to counsel for each of the
11 parties to the proposed settlement.

12
13 BY THE COURT:

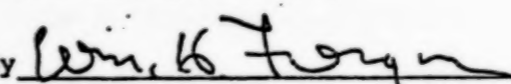
14 
15 U.S.D.J.

16 August 25, 1976.

17
18 APPROVED AS TO FORM:

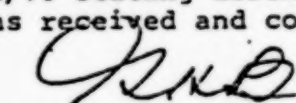
19 William H. Ferguson, Chairman
20 Plaintiffs' Steering Committee

21 Josef D. Cooper, Plaintiffs'
22 Coordinating Counsel

23 By 

24 James F. Kirkham
25 Robert D. Raven
26 Defendants' Coordinating Counsel

27 By _____

28 Mallory Letter 8/23/76 stating defendants'
29 remaining objections received and considered,
30 
31
32

THIS NOTICE APPLIES TO MEMBERS OF
THE INDUSTRIAL-USER, RETAIL GROCER AND WHOLESALER CLASSES

In re)
) Master File No.
SUGAR ANTITRUST LITIGATION)
) MDL 201

There are now pending in the United States District Court for the Northern District of California approximately eighty-five civil actions seeking treble damages for alleged violations of the antitrust laws with respect to the sale of refined sugar. Certain of these actions were brought on behalf of various classes of plaintiffs. As more specifically described below, this notice applies to the industrial-user, retail grocer, and wholesaler classes. Read this notice carefully and determine if you are a member of one or more of these classes. If you are a member of one of these classes, your rights may be affected by this Notice. This Notice does not express the opinion of the Court as to the merits of the claims or defenses asserted by either side in this litigation, but is sent to inform you of the pendency of the litigation, and the proposed partial settlement,

The complaints in this litigation differ slightly, but generally allege that defendants and certain co-conspirators conspired to and did fix, stabilize and raise the basis price for refined sugar, established prepaid freight applications, and eliminated and reduced allowances to customers. In addition, certain complaints further allege that defendants and certain co-conspirators conspired to and did restrain the sale and use of private label sugar, charge customers in some areas discriminatorily higher prices than customers in other areas, and adopt the so-called "basing point" system of pricing. It is also alleged that as a result of the conspiracy, plaintiffs and class members paid higher prices for refined sugar than would have been paid if there had been no conspiracy. Plaintiffs seek to recover treble damages and reimbursement of costs and attorneys' fees as compensation for the alleged injuries.

Defendants deny the above allegations, deny any liability, and disclaim that plaintiffs or any potential class members are entitled to recover damages... Defendants have also filed counterclaims against certain plaintiffs and class members, which plaintiffs contend are without merit.

The following corporations and associations have been named as defendants in one or more of the class lawsuits now pending before the Court:

The Amalgamated Sugar Company
American Crystal Sugar Company (a dissolved
New Jersey corporation)
American Crystal Sugar Company (a Minnesota
agricultural cooperative)
Amstar Corporation, previously known as
American Sugar Company, including its
Spreckels Sugar Division.
California and Hawaiian Sugar Company

Great Western Sugar Company
Holly Sugar Corporation
Union Sugar Division of Consolidated Foods Corporation
U and I Incorporated, formerly Utah-Idaho
Sugar Company
California Beet Growers Association
National Sugarbeet Growers Federation

PLAINTIFFS AND THE CLASSES

To qualify as a class member in the classes covered by this Notice, you must have (1) purchased refined sugar during the relevant time periods specified in the class definitions described below, (2) in one or more of the geographic areas covered, and (3) been either an industrial-user of refined sugar, a retail grocer, or a wholesaler of sugar at the time such purchases were made. You may be a member of more than one of these classes.

It is not necessary for you to have purchased refined sugar from one of the defendants, or for you to have purchased directly from a sugar manufacturer or refiner to qualify as a class member. However, the fact that you have purchased sugar does not necessarily entitle you to share in any recovery in this litigation.

Please read the following definitions carefully; they are necessary to your understanding of this Notice.

(1) Definition Of Refined Sugar:

"Refined sugar" means any grade, type or form of saccharine product (other than molasses) derived from the processing of sugar beets or in the refining of raw cane sugar, all of which contain sucrose, dextrose or levulose.

(2) Definition of Geographic Areas Covered:

The three geographic market territories involved are:

Chicago-West - Consisting of the states of
Indiana, Illinois, Iowa,
Minnesota, Wisconsin, North

Dakota, South Dakota, Kansas,
Nebraska, Colorado, Montana,
Missouri, New Mexico, Oklahoma,
Texas and Wyoming (east of
Rawlins)

California-Arizona -

Consisting of the states of
California and Arizona and
the cities of Las Vegas and
Reno

Intermountain-Northwest -

Consisting of the states of
Washington, Oregon, Utah,
Idaho and Wyoming (west of
Rawlins)

(3) Definition Of Types Of Refined Sugar Purchasers Covered By This Notice:

To qualify as a member of one of the classes covered by this notice, you must be one of the following types of refined sugar purchasers:

Industrial users - any person or entity who purchased refined sugar for use or incorporation in the production, manufacturing or processing of foodstuffs or beverages for human or animal consumption and who did not offer that sugar for resale as sugar. Restaurants included in this class are limited to those who were during the relevant time:
(a) members of the National Restaurant Association, The Food Service and Lodging Institute or their local affiliated organizations, or
(b) franchisees or franchisors that were engaged in the business of franchising restaurants in one of the three market areas described above. Hospital and health care institutions, included in this class, are limited to those identified in the American Hospital Association's annual directory, "Guide to Health Care Field", or members of the Federation of American Hospitals.

Retail grocers -

any person or entity who purchased refined sugar for eventual resale as sugar for use or incorporation by consumers in a variety of foodstuffs or beverages for human or animal consumption

...

Wholesalers - all persons or entities who directly or indirectly purchased refined sugar as wholesalers for resale as sugar in either the original package or repackaged.

THE CLASSES ESTABLISHED BY THE COURT

The classes to which this Notice pertains are:

(A) For the Chicago-West Territory

Subclass one - consisting of all industrial sugar users in the Chicago-West territory who purchased refined sugar in this area during the period from 1955 to present

Subclass two - consisting of all retail grocers in the Chicago-West territory who have purchased refined sugar in this area during the period from 1955 to present

(B) For the California-Arizona Territory

Subclass One - consisting of all industrial sugar users in the California-Arizona territory who purchased refined sugar in this area during the period from 1949 to present

Subclass Two - consisting of all retail grocers in the California-Arizona territory who purchased refined sugar in this area during the period from 1949 to present

(C) For the Intermountain-Northwest Territory

Subclass One - consisting of all industrial sugar users in the Intermountain-Northwest territory who purchased refined sugar in this area during the period from 1949 to present

Subclass Two - Consisting of all retail grocers in the Intermountain-Northwest territory who purchased refined sugar in this area during the period from 1949 to present

(D) For the Chicago-West, California-Arizona, and Intermountain-Northwest Territories

consisting of all persons or entities in the three territories previously defined who directly or indirectly purchased refined sugar as wholesalers during the period from 1949 to the present for resale as sugar in either the original package or repackaged.

Excluded from these classes are (1) the defendants, their subsidiaries and affiliated business entities, and (2) each plaintiff who has instituted and presently maintains a non-class action. The Plaintiffs representing each of these classes are listed at the end of this Notice.

Separate notice is being sent to Governmental entities which purchased refined sugar, and purchasers of molasses for agricultural use, which entities are not members of the classes to which this notice applies by virtue of purchases.

PROPOSED PARTIAL SETTLEMENT

A proposed partial settlement totalling \$24,000,000 has been reached with three defendants on behalf of the classes covered by this Notice, as follows: Holly Sugar Corporation (hereinafter "Holly") (\$5,000,000), Union Sugar Division of Consolidated Foods Corporation (hereinafter "Union") (\$2,500,000), and California and Hawaiian Sugar Company (hereinafter "C and H") (\$16,500,000). The proposed settlement with C and H, an agricultural marketing cooperative, includes settlement with C and H's 16 member patrons, one former member patron and five corporations that are parent corporations to various C and H member patrons (herein collectively called "C and H members"). These entities have settled without admitting liability, and the fact of such settlement is not to be taken as an indication that liability or damages will be found against the remaining defendants.

The proposed partial Settlement has been presented to the Court for its approval pursuant to Rule 23(e), Federal Rules of Civil Procedure, and the Court has authorized submission of the proposed settlement to the members of these classes. The Settlement Agreement has been filed with the Clerk, United States District Court, Northern District

1 of California, and is available for your inspection. The
2 following description is only a summary of the proposed
3 settlement, and you are referred to the Settlement Agreement
4 for its complete terms and provisions.

5 The settlement monies have been deposited in
6 interest-bearing trust accounts for the benefit of the
7 plaintiffs and members of the classes to which this Notice
8 applies. The settling defendants have retained the right to
9 withdraw from the proposed settlement if in the sole judgment
10 of the settling defendants a significant number of class
11 members elect to be excluded from the classes. The proposed
12 settlement relates only to defendants Holly, Union and C and H
13 and its members, and in no way limits or affects the claims
14 being advanced against the other defendants. The terms of
15 the proposed settlement apply to all antitrust claims against
16 the settling defendants arising from purchases of refined
17 sugar delivered in the three geographic market territories
18 covered by this Notice, and do not apply to purchases by
19 plaintiffs and class members delivered outside of these
20 three market territories. The place of delivery shall
21 determine whether the purchase is encompassed within the
22 settlement. The proposed settlement does not apply to the
23 governmental and agricultural molasses user classes noted above.

24 The proposed partial settlement also provides for
25 the dismissal with prejudice of all counterclaims filed by
26 Holly, Union and C and H against plaintiffs and members of
27 the classes who are to be bound by the settlement, but in no
28 way limits or affects counterclaims advanced by the other
29 defendants.

30 It is proposed that the settlement monies will be
31 held in trust accounts for the benefit of the plaintiffs and
32 class members. All interest earned on the settlement monies

1 will be added to the principal. You will be notified when
2 distribution will be made, and will be given an opportunity
3 to comment on or object to any proposed plan of distribution.
4 Any plan of distribution adopted will be subject to Court
5 approval. At the time of distribution, the settlement
6 proceeds will be subject to charges for costs of suit and
7 attorneys' fees in currently undetermined amounts. Upon proper
8 application, the Court may also allow interim reimbursement of
9 out-of-pocket expenses to defray the costs of litigation.
10 These amounts will be set by the Court as fair and reasonable.

11 You should retain and preserve whatever business
12 records you have relating to purchases of refined sugar
13 for use in submitting a claim, if necessary, upon distribution
14 of any recovery in this litigation.

15 Unless you object to the partial settlement described
16 above, you need not take any action regarding this settlement
17 at this time. A further notice will be sent to you at a
18 later date regarding distribution of the settlement proceeds.
19 PLEASE TAKE NOTICE

20 If you are a member of one or more of the classes
21 to which this Notice applies, you will be included in and
22 bound by any judgment, settlement or partial settlement in
23 this litigation, as well as any determination affecting
24 these classes, whether favorable or not, unless you file a
25 written election to be excluded from the classes with
26 William L. Whittaker, Clerk of the Court, Northern District
27 of California, P.O. Box _____, San Francisco, California,
28 postmarked no later than _____. If you exclude
29 yourself from the classes herein defined, you will remain
30 free to pursue on your own behalf whatever legal rights you
31 may have. However, if you exclude yourself, you will not
32 participate in the distribution of any recovery resulting

1 from this litigation, including the distribution of funds
2 resulting from the partial settlement referred to above.

3 If you do not elect to be excluded from the
4 classes, you may, but need not, enter an appearance through
5 an attorney of your choice. You will be represented by the
6 attorneys of record for the class representatives if you do
7 not request exclusion or enter your appearance.

8 NOTICE OF HEARING ON APPROVAL OF SETTLEMENT

9 Pursuant to Order of this Court, a hearing will be
10 held in the courtroom of The Honorable George H. Boldt,
11 Senior United States District Judge, _____ Floor, United
12 States Courthouse, 450 Golden Gate Avenue, San Francisco,
13 California at _____ a.m. on _____, 1976, for
14 the purpose of determining the reasonableness, adequacy and
15 fairness of the proposed partial settlement, and whether the
16 proposed partial settlement should be approved by the Court
17 and all actions covered by this notice dismissed with prejudice
18 as against the settling defendants only. If you are satisfied
19 with this proposed settlement, you need not appear at this
20 hearing or take any action at this time. Any member of a class
21 to which this Notice applies may appear at the hearing and show
22 cause, if any he has, why the proposed partial settlement should
23 not be approved. No person will be heard at this hearing unless
24 notice of intention to appear, and all grounds for his objection,
25 together with all supporting papers and briefs, are filed with
26 the Clerk of the Court in writing on or before _____,
27 1976, at the address stated below, and also served upon both
28 of the following:

29 Josef D. Cooper, Esq.	Bailey M. Lang, Esq.
30 Cooper & Scarpulla	Brobeck, Phleger & Harrison
31 300 Montgomery Street	111 Sutter Street
Suite 600	San Francisco, CA 94104
San Francisco, CA 94104	

32 All such documents should refer to the name and number of

1 this action: "In re Sugar Antitrust Litigation, (Master
2 File No. MDL 201)." Any class member who does not make his
3 objection in the manner provided herein shall be deemed to
4 have waived such objection and shall be forever foreclosed
5 from making any objection (by appeal or otherwise) to the
6 proposed partial settlement. The filing of an objection
7 shall not exclude the objector from any judgment entered in
8 this action. Anyone electing to be excluded from the classes
9 covered by this Notice will not participate in any future
10 distribution of the settlement monies.

11 As more fully set forth in the Settlement Agreement,
12 upon the approval of the proposed partial settlement by the
13 Court becoming final, each plaintiff accepting the settlement
14 and each class member shall be deemed to have covenanted to
15 refrain from proceeding against the settling defendants and
16 the C and H members on any claims which were alleged or
17 could have been alleged in these actions up to (the date of
18 the agreement) pertaining to purchases of refined sugar
19 delivered in the three relevant geographic market territories,
20 and based on or related to any federal or state antitrust
21 law, or which are based on or related to any facts, matters
22 or claims which were alleged or could have been alleged in
23 said actions up to the date of said agreements pertaining to
24 refined sugar and based on or related to any federal or
25 state antitrust laws. Under the terms of the Settlement
26 Agreement, any similar claim based upon deliveries to plaintiffs
27 and class members outside of the three geographic market
28 territories shall be dismissed without prejudice.

29 FILING DOCUMENTS OR ELECTION TO BE EXCLUDED

30 All documents that you file in this litigation should
31 be addressed to:
32 . . .

William L. Whittaker
Clerk, United States District Court
Northern District of California
P. O. Box
San Francisco, California

The postmark on your envelope will determine if any document
has been filed timely with the Court.

ADDITIONAL INFORMATION REGARDING THIS NOTICE

If you have any questions which you want to raise
concerning the matters dealt with in this Notice, please
direct your inquiries to the following members of Plaintiffs'

Notice Committee:

Industrial-User Class

Josef D. Cooper, Esq.
Hazel I. Weiser, Attorney at Law
Cooper & Scarpulla
300 Montgomery Street, Suite 600
San Francisco, California 94104
Telephone: (415) 788-7210

Retail Grocer Class

Guido Saveri, Esq.
111 Sutter Street, Suite 2100
San Francisco, California 94104
Telephone: (415) 434-2100

Wholesaler Class

John H. Boone, Esq.
Boone, Schatzel, Hamrick & Knudsen
235 Montgomery Street
San Francisco, California 94104
Telephone: (415) 788-0656

The pleadings and other records in this litigation
may be examined and copied at any time during regular office
hours at the office of the Clerk, United States District
Court, 18th Floor, 450 Golden Gate Avenue, San Francisco,
California.

DATED:

William L. Whittaker, Clerk
United States District Court

LIST OF PLAINTIFFS REPRESENTING THE CLASSES

(To be supplied after entry of Order
contemplated by paragraph 5 of Order Modifying
Class Action Order dated May 20, 1976,
filed August 16, 1976)

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LEGAL NOTICE
WITH RESPECT TO CLAIMS IN
CONNECTION WITH THE PURCHASE
OF REFINED SUGAR

In re)
SUGAR ANTITRUST LITIGATION) Master File No.
) MDL 201
)
THIS DOCUMENT RELATES TO:)
)
STATE OF)
)
Plaintiff,)
)
v.) No.
)
2)
)
Defendants.)

Pursuant to Rule 23(c) (2) of the Federal Rules of
Civil Procedure, YOU ARE HEREBY NOTIFIED:

There are now pending in this Court approximately
eighty-five civil actions for treble damages for alleged
violation of the antitrust laws with respect to the sale of
refined sugar. The defendants in these actions include the
principal sugar producers operating in the State of _____
which are listed below. Certain of these actions have been
certified by the Court as class actions.

A. The _____ Governmental Class

One of the actions which has been certified as a
class action is the action brought by the State of _____
on behalf of the following class:

The State of _____ and all its cities,
counties and other political subdivisions and
public entities, including hospital and school
districts, that have purchased refined sugar

directly or indirectly during the period from
_____ to present.

You may be a member of this class, and, if so, your
rights may be affected by this litigation. This Notice is not
to be understood as an expression of any opinion by this Court
as to the merits of any of the claims or defenses asserted by
either side of this litigation, but is sent for the sole purpose
of informing you of the pendency of this litigation so that
you may decide what steps you wish to take in regard thereto.
To qualify as a class member, it is necessary that you have
purchased refined sugar; however, it is not necessary for you
to have purchased refined sugar manufactured by one of the
defendants nor need you have purchased directly from a manu-
facturer or refiner to participate in this litigation.

B. Litigation

The complaints in this litigation may differ
slightly with respect to the area of the country in which
the alleged violations are said to have taken place and with
respect to the period during which the alleged violations
are said to have occurred. However, each complaint alleges, --
in substance, that the defendants and certain co-conspirators
conspired to and did: Fix, stabilize, and raise the effective
selling price for refined sugar; establish and raise the
basis price for refined sugar; establish prepaid freight
application, and; eliminate, reduce and restrict certain
allowances to customers for refined sugar. In addition,
certain complaints further allege that defendants and certain
co-conspirators conspired to and did: Restrain the sale and
use of private label sugar, charge customers in some areas
discriminatorily higher prices than customers in other
areas, and adopt the so-called "basing point" system of pricing.
The complaints allege that, as a result of the

1 alleged violations, plaintiffs and each class member paid
2 higher prices for refined sugar than would have otherwise
3 been paid but for the alleged conspiracy. The complaints
4 seek to recover treble damages, together with reimbursement
5 of costs and an award of attorneys fees as compensation for
6 these alleged injuries, in addition to injunctive and other
7 relief.

8 The defendants deny the foregoing allegations,
9 deny liability, and deny that the plaintiffs or any potential
10 class members are entitled to damages or to share in any
11 recovery in this litigation.

12 C. The Defendants

13 The defendants in the State of _____
14 action are the following corporations and associations:

15
16
17 D. Refined Sugar

18 The term "refined sugar", as used in this Notice,
19 means any grade, type or form of saccharine product, other
20 than molasses, derived from the processing of sugar beets or
21 in the refining of raw cane sugar, all of which contains
22 sucrose, dextrose or levulose. Refined sugar is produced
23 regularly in at least the following grades: (1) granulated
24 sugar; (2) fine granulated sugar; (3) powdered sugar; (4)
25 brown sugar; (5) bakers superfine sugar; (6) cubes;
26 (7) individual packets; (8) liquid sucrose sugar; (9) liquid
27 invert sugar; (10) bulk sugar; and (11) bagged sugar.

28 NOW THEREFORE, TAKE NOTICE:

29 1. If you are a member of the _____
30 Governmental Class to which this Notice applies, as defined in
31 paragraph A above, you will be included in and bound by any
32 judgment in this litigation, and any determination affecting

1 these classes whether favorable or not, unless you mail to the
2 Clerk of the United States District Court for the Northern
3 District of California, P. O. Box _____, San Francisco,
4 California 94102, on or before _____

5 a written election to be excluded from the class. If you elect
6 to be excluded from the class, you will remain free to pursue
7 on your own behalf whatever legal rights you may have.

8 2. If you do not elect to be excluded from the class,
9 you may, but need not, enter an appearance through counsel of
10 your choice, and you have all the rights set forth in Rule 23
11 of the Federal Rules of Civil Procedure. If you do not request
12 exclusion or enter an appearance, you will be represented by
13 the Attorney General of the State of _____, or his
14 designated representative in this litigation.

15 3. All documents which you desire to file of record
16 in this case, including any requests to be excluded from the
17 class, or an appearance through counsel of your choice, should
18 be addressed to: Clerk of the United States District Court,
19 Northern District of California, P. O. Box _____, San Francisco,
20 California 94102. The postmark on your envelope will determine
21 if an election to be excluded from the class has been filed timely

22 4. If you have any questions that you want to
23 raise concerning the matters dealt with in this Notice, please
24 direct all inquiries in writing to:

25
26
27
28
29 You should retain and preserve whatever business records
30 you have relating to purchases of refined sugar, for use in
31 submitting a claim, if necessary, upon distribution of any
32 recovery in this litigation.

1 5. The pleadings and other records in this litigation
2 (Master File No. M.D.L. 201) may be examined and copied at any
3 time during regular office hours at the office of the Clerk.

4 DATED:

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7 Clerk, United States District Court
8 for the Northern District of California
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1 NOTICE OF CLASS ACTION DETERMINATION TO
2 INDUSTRIAL MOLASSES PURCHASERS
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7 UNITED STATES DISTRICT COURT
8
9 NORTHERN DISTRICT OF CALIFORNIA

10 In re)
11 SUGAR ANTITRUST LITIGATION) MASTER FILE NO.
12) MDL 201

13 Pursuant to Rule 23(c)(2), Federal Rules of Civil
14 Procedure, and Order of the United States District Court for
15 the Northern District of California, YOU ARE HEREBY NOTIFIED:

16 There are now pending in this Court two civil
17 actions for treble damages for alleged violation of the
18 antitrust laws with respect to the sale of molasses in the
19 Chicago-West Territory, California-Arizona Territory and
20 Intermountain-Northwest Territory.*

21 As used herein the term "molasses" means any
22 grade or type of saccharine product derived from sugar cane
23 or sugar beets which is principally not of crystalline
24 structure and which contains soluble non-sugar solids (excluding
25 any foreign substances which may have been added or developed

26 * The Chicago-West Territory includes the following sixteen
27 states: Indiana, Illinois, Iowa, Minnesota, Wisconsin, North
28 Dakota, South Dakota, Nebraska, Kansas, Colorado, Montana,
29 Missouri, New Mexico, Oklahoma, Texas and Wyoming (east of
30 the town of Rawlins).

31 The California-Arizona Territory includes the following
32 two states and two cities, California, Arizona and the cities
of Las Vegas and Reno, Nevada.

The Intermountain-Northwest Territory includes the fol-
lowing five states: Washington, Oregon, Utah, Idaho and
Wyoming (west of the town of Rawlins).

1 in the product) in excess of 6% of the total soluble solids.
2 "Molasses" includes, but is not limited to, products generally
3 known as "blackstrap molasses," "refinery molasses" and
4 "beet molasses" but excludes liquid sugar. The defendants,
5 which include the principal cane and beet refining and pro-
6 cessing companies in the three marketing territories, are:
7 Great Western Sugar Company; Holly Sugar Corporation; California
8 and Hawaiian Sugar Company; Union Sugar Division of Consolidated
9 Foods Corporation; American Crystal Sugar Company (a dissolved
10 N. J. Corp.); The Amalgamated Sugar Company; National Sugarbeet
11 Growers Federation; U and I, Incorporated, formerly Utah-
12 Idaho Sugar Company; and Amstar Corporation, previously
13 known as American Sugar Company, and including its Spreckels
14 Sugar Division. These actions have been brought as class
15 actions on behalf of the class defined below.

16 This Notice is being given to you in the belief
17 that you may be a member of that class of plaintiffs whose
18 rights may be affected by this litigation. This Notice is
19 not to be understood as an expression of any opinion by this
20 Court as to the merits of any of the claims or defenses
21 asserted by either side in this litigation, but is sent for
22 the sole purpose of informing you of the pendency of this
23 litigation so that you may decide what steps you wish to
24 take in regard thereto.

25 A. The Litigation. The complaints in this litigation
26 allege, in substance, that from at least 1955 to the present
27 time, the defendants and their co-conspirators engaged in a
28 combination and conspiracy to restrain unreasonably the
29 interstate trade and commerce of the United States in violation
30 of the antitrust laws of the United States, and to monopolize

31 . . .
32 . . .

1 or to attempt to monopolize this interstate trade and commerce
2 in violation of the antitrust laws of the United States.

3 This combination and conspiracy, plaintiffs contend,
4 consisted of a continuing agreement, understanding and
5 concert of action among the defendants and their co-conspira-
6 tors to establish and raise the basis prices for molasses, to
7 establish prepaid freight applications, to eliminate, reduce
8 and restrain the providing of allowances to customers for
9 molasses, to establish, raise, maintain and stabilize the
10 effective selling prices for molasses, to use the monopoly
11 power enjoyed by various of the defendants and their co-
12 conspirators in certain markets to finance and support the
13 previously described practices, and to maintain prior agreed
14 upon market shares within the various markets for molasses.

15 The complaints contend that as a result of the
16 alleged conspiracy the plaintiffs and each class member paid
17 higher prices for molasses than they would otherwise have
18 paid. The complaints seek to recover treble damages, together
19 with reimbursement of costs and an award of attorneys' fees,
20 as compensation for these alleged injuries.

21 Defendants deny the foregoing allegations, deny
22 liability, and deny that the plaintiffs or any potential
23 class members are entitled to damages. Defendants have also
24 filed counterclaims against certain plaintiffs and class
25 members, which plaintiffs contend are without merit.

26 B. Plaintiffs and the Class. Pursuant to the Court's
27 Order, the class on whose behalf these actions may be maintained,
28 and the representative parties, include all persons or entities
29 in the Chicago-West Territory, in the California-Arizona
30 Territory and in the Intermountain-Northwest Territory who
31 purchased molasses for industrial use in the manufacturing,
32 compounding, formulating or mixing of animal feed and other

1 agricultural products during the period from 1955 to the
2 present. The industrial molasses users in this class must
3 have purchased for use or incorporation in producing, manufac-
4 turing or processing animal feed or other agricultural products
5 for animal consumption, and must not have offered such molasses
6 for resale as molasses. The representative parties are:

7 DISTRICT OF MINNESOTA

8 Seeco, Inc., and W.R.
9 Grace & Co. C75-1131-GHB
10 Missouri Farmers Associa-
11 tion, Inc. C75-1808-GHB

12 This Notice does not apply to classes of governmental
13 entities, industrial-users, retail grocers and wholesale
14 purchasers of refined sugar which were also certified by the
15 Court. Separate Notice is being sent to those classes, which
16 should be consulted if you fit within one of those categories.

17 NOW, THEREFORE, TAKE NOTICE:

18 1. If you are a member of the class to which this
19 Notice applies, as defined in Paragraph B above, you will be
20 included in and bound by any judgment, settlement or partial
21 settlement in this litigation, and any determination affecting
22 this class, whether favorable or not, unless you mail to Wm. L.
23 Whittaker, Clerk, United States District Court, Northern
24 District of California, P.O. Box _____, San Francisco,
25 California _____, on or before _____,
26 1976, a written election to be excluded from the class. If
27 you elect to be excluded from the class, you will remain free
28 to pursue on your behalf whatever legal right you may have.

29 2. Those members of the class who wish to be represented
30 by the class counsel appointed by the Court need take no
31 further action at this time. However, if you prefer in
32 connection with your individual claim to be represented by your

1 own counsel, you may enter an appearance through your own
2 counsel; but if you so choose, you must do so by filing in
3 writing no later than _____, 1976.

4 3. Those class members who do not request exclusion
5 should take steps to preserve their invoices, sales slips or
6 other evidence of their molasses purchases, in order to
7 protect their claims in this litigation.

8 4. If damages are recovered on behalf of the class,
9 some portion of the amount recovered may be used to compensate
10 attorneys for the class; and it is expected that this expense
11 would be shared by the members of the class in proportion to
12 their individual recoveries, if any. If no recovery is made
13 on behalf of the class, class members will not be required
14 to compensate counsel for the class.

15 5. All documents which you desire to file of record in
16 this case, including any request to be excluded from the
17 class or an appearance through counsel of your choice, should
18 be addressed to: Wm. L. Whittaker, Clerk, United States
19 District Court, Northern District of California, P.O. Box _____,
20 San Francisco, California _____. The postmark on your
21 envelope will determine if an election to be excluded from the
22 class or a notice of intention to appear has been filed timely.

23 6. If you have any questions which you want to raise con-
24 cerning the matters dealt with in this Notice, please direct
25 your questions in writing to:

26 Molasses Committee
27 P.O. Box _____
San Francisco, California

28 7. The pleadings and other records in this action,
29 "In re Sugar Antitrust Litigation," (Master File No. MDL 201)

30 . . .
31 . . .
32 . . .

1 may be examined and copied at any time during regular office
2 hours at the office of the Clerk, United States District
3 Court, 18th Floor, 450 Golden Gate Avenue, San Francisco,
4 California.

5 DATED:

6 Wm. L. Whittaker, Clerk
7 United States District Court
8 Northern District of California
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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 IN RE SUGAR ANTITRUST) MDL-201
4 LITIGATION)
5) ORDER RE DEFENDANT NATIONAL
6) SUGARBEET GROWERS FEDERATION'S
7) (NSGF) MOTION TO DISMISS FOR
8) LACK OF JURISDICTION AND
9) PROPER VENUE
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In the Order of December 23, 1975, the Court concluded that jurisdiction was lacking and venue improper with respect to plaintiff's claims against defendant NSGF filed in California, Minnesota and Illinois Districts. Although the Court considered severance and transfer of the claims preferable to dismissal, counsel were given an opportunity to file supplemental memoranda concerning the efficacy of a transfer of the NSGF claims and the location of a satisfactory forum for transfer.

The supplemental memoranda have been received, fully considered and the Court concludes that no useful purpose would be served by dismissing or transferring, for all purposes, the claims against defendant NSGF only to have them refiled in the District of Colorado and transferred to this Court by a further order from the Judicial Panel on Multi-district Litigation.

IT IS HEREBY ORDERED that the claims against defendant NSGF filed in District Courts in the states of California, Minnesota, Illinois or other states shall and hereby are severed and deemed transferred to the District of Colorado as the proper transferor court. Provided that; the files in the cases will be retained by the clerk of the transferee court in San Francisco until the pretrial proceedings are completed at which time the MDL-201 transferee judge will determine what court or courts are the appropriate forums for trial, after full consideration of the best interests

ORDER RE NSGF'S MOTION
TO DISMISS - #1.

1 by them in their memoranda in response to defendants' motion
2 to dismiss.

3 IT IS HEREBY SO ORDERED this 4th day of March, 1976.

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7 SR. UNITED STATES DISTRICT JUDGE

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32 ORDER RE MOTION TO DISMISS
FOR FAILURE TO ANSWER CLASS
ACTION INTERROGATORIES - #2.

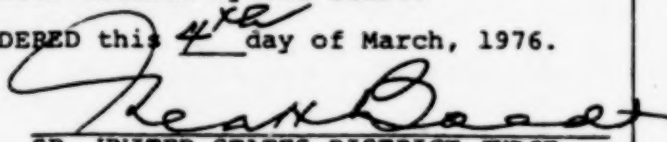
1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 IN RE SUGAR ANTITRUST) MDL-201
4 LITIGATION)
5) ORDER RE PLAINTIFFS' MOTION
6) TO DISMISS DEFENDANTS'
7) COUNTERCLAIMS

8 At the pretrial conference held December 9 and 10, 1975,
9 the Court directed counsel for defendants asserting counter-
10 claims to inform the Court which of the claims were compulsory
11 and which were permissive pursuant to F.R.Civ.P. 13.
12 Defendants responded by designating all the counterclaims
13 compulsory and cited Union Paving Company v. Downer Corp.,
14 276 F.2d 468 (9th Cir. 1960) for the proposition that compul-
15 sory counterclaims are those which bear a "very definite,
16 logical relationship" to the main claim. The main contention
17 of plaintiffs in this litigation, simply stated, is that
18 defendants, sugar refiners and processors, have engaged in a
19 broad, ongoing conspiracy to restrain trade with respect to
20 the sale of refined sugar in various geographic markets.

21 Thus far, discovery on the merits has not been extensive
22 in this litigation and the Court is reluctant to strike any of
23 defendants' counterclaims on the basis of the argument of
24 counsel rather than upon facts developed in discovery. On
25 the other hand, some of defendants' counterclaims appear to
26 have very little logical relationship to plaintiffs' claims.
27 In these circumstances, the Court denies plaintiffs' motion
28 at this time, with leave to reassert it at the conclusion of
29 discovery; provided, that no discovery shall be conducted
30 concerning the counterclaims until the conclusion of pretiral
31 discovery, unless otherwise ordered by the Court.

32 IT IS HEREBY SO ORDERED this 4th day of March, 1976.


SR. UNITED STATES DISTRICT JUDGE

ORDER RE MOTION TO
DISMISS COUNTERCLAIMS

[See Signature Pages for
names and addresses of counsel]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE SUGAR ANTITRUST LITIGATION) Master File No.
)
) MDL 201

THIS DOCUMENT RELATES TO:

ALL ACTIONS)
)
)

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 26(c), Federal Rules of Civil Procedure,
Plaintiffs herein request this Court issue a protective order
prohibiting the depositions of Plaintiffs as presently noticed.

On July 8, 1975, the Court established a schedule for class
action determination which required Plaintiffs to file their
class papers on or before September 8, 1975, and Defendants
to reply thereto on or before October 10, 1975.

The pretrial schedule leading to discovery was reaffirmed
by this Court on August 18, 1975 at the second Pretrial Con-
ference.

Consolidated Class Action Motions were filed by a
majority of the private plaintiff litigants and a consolidated
motion was filed by state and governmental entities on
September 10, 1975. Separate Class Action Motions were filed
by two Plaintiffs at or about the same time. ^{1/}

The Court's Second Pretrial Order scheduled the serving of
Consolidated Interrogatories upon Plaintiffs no later than
August 30, 1975 and required Plaintiffs to reply to the same no
later than September 26, 1975. (Pretrial Order No. 2, Para-
graph 3).

Pretrial Order No. 2 further states that the Defendants
may, at any time not less than ten days after the filing of
Plaintiffs' Answers to Defendants' Interrogatories, or if a
motion to compel is made, not less than ten days following
the taking of further discovery or the entry of an Order denying
Defendants' Motion for such discovery (whichever is later),
commence the taking of depositions relating to such Plaintiffs,
limited to class action issues.

On September 17, 1975, Defendants filed notices to take
134 depositions in four different cities simultaneously over
a period of approximately five weeks. Many of the Plaintiffs
noticed have not filed class actions and do not represent nor
purport to represent any class of sugar purchasers.

^{1/} Separate Private Party Class Motions were filed by Plaintiff
United A. G. Cooperative, Inc. and Plaintiff Seeco, Inc.,
limited to nonindustrial wholesalers and industrial users
of molasses and sugar, respectively, as more particularly
defined in their Motions.

1 The notices for deposition indicate that the Defendants
2 will question the deponents on the following matters:

3 " (1) the purchase of sugar by such party
4 (including quantities, terms and prices thereof);

5 " (2) the facts supporting the charging alle-
6 gations of such party's complaint (other than
7 class action allegations); and

8 " (3) the facts supporting the class action
9 allegations of such party's complaint.

10 Plaintiffs submit that the Defendants' proposed depositions
11 are unreasonable, unduly burdensome and unrelated to the
12 deposition discovery permitted by Pretrial Order No. 2.

13 Rule 26(c), Federal Rules of Civil Procedure, provides in
14 pertinent part:

15 " (c) Protective Order: Upon motion by a
16 party or by a person from whom discovery is
17 sought, and for good cause shown, the court
18 in which the action is pending or alternatively,
19 on matters relating to a deposition, the court
20 in the district where the deposition is to be
21 taken may make any order which justice requires
22 to protect a party or person from annoyance,
23 embarrassment, oppression, or undue burden or
24 expense. . . ."

25 With respect to the first subject of inquiry -- the purchase
26 of sugar by each party plaintiff -- such information can be
27 secured promptly and with a minimum of expense through answers
28 to written interrogatories. Plaintiffs have no objection to
29 supplying such information and in fact such information is
30 presently being compiled for Defendants in response to their
31 First Consolidated Set of Interrogatories.

32 Moreover, securing information concerning purchases
through answers to written interrogatories is eminently more

1 practicable and feasible than attempting to secure such infor-
2 mation through depositions, since virtually no person is
3 capable of reciting such detailed information from memory.

4 The Defendants' second subject of inquiry -- the facts
5 supporting the charging allegations of the parties' complaint
6 other than the class action allegations -- is impermissible
7 under Pretrial Order No. 2 and is irrelevant to the request for
8 class action determination.

9 Pretrial Order No. 2 specifically limits the taking of any
10 depositions at this stage in the litigation to information needed
11 to respond to the class action issues.

12 At the time of the Pretrial Conference, Plaintiffs advo-
13 cated that discovery not be taken in waves and that they would
14 answer interrogatories and deposition questions relating to
15 all matters in the lawsuit. Defendants, however, insisted that
16 discovery be limited to waves. The difference resulted in
17 Paragraph 4 of Pretrial Order No. 2, which confined depositions
18 to the class action issues only.

19 Defendants' second area of proposed deposition inquiry,
20 however seeks information outside the class action allegations.
21 This subject matter, at Defendants own insistence, is inappro-
22 priate at this time.

23 Moreover, Plaintiffs are willing to stipulate that at the
24 present time, the factual basis for the charging allegations
25 were and are derived from the Government indictments and civil
26 complaints filed against the Defendants.

1 Depositions on substantive allegations of the complaints
2 are therefore improper and unnecessary.

3 Finally, Defendants seek to take depositions in order to
4 ascertain the "facts supporting the class action allegations."
5 This description is too broad and vague to permit the taking of
6 134 depositions.
7

8 Defendants never indicate what class action facts they
9 believe would be elicited during such depositions which are not
10 already in the class action papers of the moving parties, or
11 which they could not obtain through written interrogatories.
12

13 The overly-broad nature of the deposition request is under-
14 scored by the fact that the Defendants seek to depose all party
15 plaintiffs in these proceedings, regardless of whether they re-
16 present or purport to represent a class. Many of the noticed
17 deponents have not filed class actions and only seek to repre-
18 sent themselves and no others.

19 The depositions of such large numbers of non-class
20 plaintiffs would in no way provide the Defendants with any
21 relevant or permissible discovery as to the "facts" supporting
22 the class action allegations of other plaintiffs in different
23 lawsuits.
24

25 Plaintiffs submit that all of the basic facts relied on
26 by them in support of their class action allegations and which
27 are necessary for a class action determination are set forth in
28 their moving papers. However, if Defendants feel that further
29 specific facts are necessary for them to respond, Plaintiffs
30 suggest that Defendants identify the areas of such limited
31

1 factual inquiry and Plaintiffs might then be able to either
2 supply the information through answers to Interrogatories to
3 written interrogatories, or, if possible, by stipulation.

4 The requested depositions of 134 party plaintiffs in four
5 different cities over a period of five weeks on such an overly-
6 broad and unspecific subject matter is unduly burdensome, and
7 oppressive, especially in light of the fact that it seeks to
8 depose non-class party plaintiffs.
9

10 Plaintiffs are not suggesting that Defendants are not
11 entitled to take any depositions of any of the Plaintiffs at
12 this time. Rather, Plaintiffs suggest that a more sensible
13 procedure, and one consistent with the briefing schedules
14 established by this Court, would be for the Defendants to take
15 the depositions of a representative number of Plaintiffs --
16 for example, one or two in each geographic area. Defendants
17 would then be in a position to argue to the Court that the infor-
18 mation secured from these Plaintiffs is necessary to the class
19 action issues, and therefore the remaining Plaintiffs should be
20 deposed. Defendants would also have to show under such cir-
21 cumstances, that they could not generalize from the information
22 secured from these deponents to the other Plaintiffs in this
23 litigation, to avoid any unnecessary duplication or repetition
24 of similar answers by parties similarly situated.
25

26 Likewise, after the taking of such representative depo-
27 sitions, Plaintiffs would be in a position to ascertain the
28 relevancy of the information to the question of whether this
29 litigation should be certified as a class.
30
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1 The parties, if they then could agree, could move to
2 either limit or extend discovery. The court itself, under
3 such a procedure, would then be in the best possible position
4 to rule on the issue.

5 WHEREFORE, for the reasons stated above, Plaintiffs
6 respectfully request this Court issue a Protective Order pro-
7 hibiting the depositions of Plaintiffs as presently noticed.

8 Dated: September 24, 1975 Respectfully submitted,

9
10
11 Harold E. Kohn
12 HAROLD E. KOHN
13 1214 IVB Building
14 1700 Market Street
15 Philadelphia, Pennsylvania 19103

16 On Behalf of Himself and
17 Plaintiffs' Counsel in All Actions.
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C O P Y

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 AT SAN FRANCISCO
4

5 IN RE:

6 SUGAR ANTI-TRUST CASES
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9 PRE-TRIAL CONFERENCE
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13 July 8, 1975
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24 The HONORABLE GEORGE H. BOLDT, Presiding
25

1 A P P E A R A N C E S

2 FOR THE PLAINTIFFS:

3 WILLIAM ABBEY

4 DONALD BARRY

5 JAMES E. BECKLEY

6 EDWARD A. BERMAN

7 PETER BLEAKLEY

8 THOMAS L. BOEDER

9 FLOYD E. BOLINE

10 JOHN BRIGHT

11 ROBIN JAMES BROZNEY

12 JOHN E. BURKE

13 JOSEPH BURKARD

14 PETER BYRNES

15 HENRY CAREY

16 JOHN A. COCHRANE

17 JERRY S. COHEN

18 ROBERT F. COLEMAN

19 SHELDON COLLEN

20 STEVEN DUNN

21 WILLIAM H. FERGUSON

22 LEE A. FREEMAN

23 MICHAEL FREED

24 PERRY GOLDBERG

25 LEON GOODRICH

1 FOR THE PLAINTIFFS: (cont'd)

2 THOMAS GREENAN

3 DAVID GOLD

4 KENTON GRANGER

5 J. NAT HAMMERICK

6 JAMES HURT

7 JAKE JOHNS

8 HAROLD E. KOHN

9 ALBERT MALANCA

10 ERIC OLSON

11 RICHARD RAPPAPORT

12 ROBERT A. SEEFRIED

13 JAMES SLOAN

14 RICHARD SCHREPFFERMAN

15 PAUL SPRENGER

16 HOWARD SILVER

17 DANIEL SOLIN

18 JEROME H. TORSHEN

19 LAWRENCE WALNER

20 FOR THE DEFENDANTS:

21 STEPHEN BOMSE

22 WILLIAM BOYD

23 JAMES J. BROSNAHAN, JR.

24 MARK FAIRMAN

25 JAMES KIRKHAM

1 LAWRENCE KEESHAN

2 FIELDING LANE

3 BAILEY LANG

4 BRUCE MONTGOMERY

5 JAMES MADISON

6 JOHN MUNTER

7 R. F. OUTCAULT

8 ROBERT D. RAVEN

9 JAMES YOUNG

10 ROBERT VIZAR

11 ON BEHALF OF THE UNITED STATES GOVERNMENT:

12 ROBERT STAAL

13 MARK ANDERSON

14 * * * * *

15 THE COURT: I extend my appreciation to
16 you for your splendid efforts to get on with this business by
17 developing quite a large number of agreed matters, selecting
18 your steering committees and your individual representatives,
19 so that on each occasion that I have to talk to all of you I
20 merely have to call two people.

21 Have you decided on your title, Mr. Bcmse?

22 MR. BOMSE: Your Honor, liaison or
23 coordinating counsel.

24 THE COURT: All right, we will call you
25 the defendants' coordinator.

MR. BOMSE: Fine

1 THE COURT: And we are ready for
2 business. We will start down the agenda.

3 MR. FERGUSON: Your Honor, may I
4 introduce myself and proceed?

5 THE COURT: You will have to state
6 your name every time for Mrs. Holloway. Eventually
7 she may learn to know the names of all of you, but not
8 now.

9 MR. FERGUSON: I am Wayne P. Ferguson
10 of Seattle, Washington. I am one of the attorneys for
11 the 1812 case and one of the attorneys in the Northwest
12 Candy case. I speak today as ad hoc chairman of the
13 plaintiffs' steering committee, and as such, I will
14 try to answer Your Honor's inquiry about our areas of
15 agreement.

16 We have submitted to you a plaintiffs' pre-
17 trial order. The defendants have likewise submitted
18 to you a proposed pre-trial order. They are the same
19 in many, many particulars. I am going to give you
20 the ones where we are in complete agreement in just a
21 moment.

22 I might say that plaintiffs and defendants
23 have worked very well together. They had a meeting
24 yesterday. Our drafting committees have met together,
25 and they have worked out most of the problems. The few

1 problems that remain can, I think, be heard in a
2 short time, but I will first give you the matters
3 that we are in agreement on.

4 First, the section references here to the
5 suggested pre-trial orders, first is the Order of
6 Co-Ordination, which is Section I in the agreement.

7 (Off the record discussion)

8 MR. FERGUSON: I will repeat again
9 the matters that we are in agreement on are: first,
10 the Order of Co-Ordination, which is Section I; the
11 Master Docket, which is Section II; the Master Docket
12 and Separate Action Files, which is Section III. And
13 all of these numbers are Roman Numerals for the record.

14 The next one is Newly Filed or Transferred
15 Actions, Section IV; Application of This Order to
16 Subsequently Filed Cases, Section V; Captions of Cases,
17 Section VI; Filing and Docketing, Section VII; Further
18 Transfer or Assignment of Actions, Section VIII; Admission
19 of Attorneys, Section X; Amendments to Pleadings,
20 Section XI; Answers and Motions Addressed to Complaints,
21 Section XII; Steering Committees, Section XIII; Co-
22 Ordinating Counsel, Section XIV; Emergency Orders,
23 Section XX;

24 Now, may I, while I am here, cover the items
25 that we are not in agreement on, Your Honor?

1 THE COURT: Yes.

2 MR. FERGUSON: They are Rules of
3 Procedure, Section IX; Necessity of an Order Directed
4 to Preservation of Documents and Plaintiffs' Depository,
5 Section XV; Procedure for Class Determination, Section
6 XVI; Grand Jury Documents, Section XVII; Scheduling
7 of First Wave Discovery, Section XVIII; and then the
8 Language of a Protective Order, Section XIX; Scheduling
9 of the Next Pre-Trial Conference, Section XXI; Dis-
10 covery with Respect to Motions, Section XXII; and
11 Procedure as to Discovery, Defendants, Section XXIII;
12 and whatever other matters the Court might deem
13 appropriate.

14 Now, would you like me to start on behalf of
15 the plaintiffs and take up the matters that are --

16 THE COURT: I wonder if we shouldn't
17 follow the agenda. We will get down to these matters
18 shortly.

19 MR. FERGUSON: Very good.

20 THE COURT: Does anyone wish to make
21 any comment additional to those Mr. Ferguson has just
22 made? If not, then, I will take it that it is
23 substantially correct.

24 At this point, I want to interrupt for some
25 introductions.

1 (Off the record introduction
2 of staff)

3 THE COURT: We will take the matters
4 in the order listed here; namely, the admission of out
5 of state counsel for purposes of these proceedings.
6 If there are any counsel present who have not yet been
7 admitted to practice, at least ad hoc, please stand up
8 and one by one give the court reporter your name and
9 district.

10 MR. FREEMAN: Lee A. Freeman of the
11 Northern District of Illinois.

12 MR. FERGUSON: William H. Ferguson,
13 Western District of Washington.

14 MR. KOHN: Harold E. Kohn, K-O-H-N,
15 Eastern District of Pennsylvania.

16 MR. MALANCA: Albert Malanca, Western
17 District of Washington.

18 MR. COCHRANE: John A. Cochrane,
19 District of Minnesota.

20 MR. TORSHEN: Jerome H. Torshen,
21 Northern District of Illinois.

22 MR. GOLDBERG: Perry Goldberg,
23 Northern District of Illinois.

24 MR. BURKE: John E. Burke, Northern
25 District of Illinois.

1 MR. SCHREPPERMAN: Richard Schrepferman,
2 S-C-H-R-E-P-F-E-R-M-A-N, District of Colorado.

3 MR. SEEFRIED: Robert A. Seefried,
4 Northern District of Illinois.

5 MR. HAMMERICK: J. Nat Hammerick,
6 Western District of North Carolina.

7 MR. BLEAKLEY: Peter Bleakley, District
8 of the District of Columbia.

9 MR. MONTGOMERY: Bruce Montgomery,
10 District of the District of Columbia.

11 MR. RAPPAPORT: Richard J. Rappaport,
12 Northern District of Illinois.

13 MR. COLEMAN: Robert F. Coleman,
14 Northern District of Illinois.

15 MR. COHEN: Jerry S. Cohen, District
16 of the District of Columbia.

17 MR. BECKLEY: James E. Beckley,
18 Northern District of Illinois.

19 MR. FREED: Michael Freed, Northern
20 District of Illinois.

21 MR. BARRY: Donald Barry, B-A-R-R-Y,
22 District of Kansas.

23 MR. SOLIN: Daniel R. Solin, Southern
24 District of New York.

25 MR. BERMAN: Edward A. Berman, Northern

1 District of Illinois.

2 MR. WALNER: Lawrence Walner, Northern
3 District of Illinois.

4 MR. SLOAN: James Sloan, Northern
5 District of Illinois.

6 MR. GOODRICH: Leon Goodrich, District
7 of Minnesota.

8 MR. BYRNES: Peter Byrnes, Western
9 District of Washington.

10 MR. SPRENGER: Paul Sprenger, District
11 of Minnesota.

12 MR. OLSON: Eric Olson, District
13 of Minnesota.

14 MR. SILVER: Howard Silver, Eastern
15 District of Michigan.

16 MR. GRANGER: Kanton C. Granger,
17 District of Kansas.

18 MR. BRIGHT: John Bright, Western
19 District of Washington.

20 MR. DUNN: Steven Dunn, Eastern
21 District of Louisiana.

22 MR. ABBEY: William Abbey, Central
23 District of California.

24 MR. BOEDER: Tom L. Boeder, Western
25 District of Washington.

1 MR. BRESNAHAN: James R. Bresnahan,
2 District of Minnesota.

3 MR. BOLINE: Floyd E. Boline, District
4 of Minnesota.

5 MR. GREENAN: Thomas Greenan, Western
6 District of Washington.

7 MR. BURKARD: Joe Burkard, District
8 of Minnesota.

9 MR. HURT: James Hurt, Western District
10 of Washington.

11 MR. COLLEN: Sheldon Collen, Northern
12 District of Illinois.

13 MR. CAREY: Henry Carey, District of
14 Oregon.

15 MR. JOHNS: Jake Johns, District of
16 Oregon.

17 THE COURT: I might say that I have
18 invited counsel for the government to attend and
19 participate in any discussion with respect to coordina-
20 tion of discovery and like matters. They are welcome
21 here, and if they are present now, please stand and
22 identify yourself.

23 MR. STAAL: I am Robert A. Staal,
24 S-T-A-A-L.

25 MR. ANDERSON: I am Mark Anderson.

1 THE COURT: And what is your professional
2 status here?

3 MR. STAAL: We are both trial attorneys
4 with the Anti-Trust Division, and we are in charge of
5 this litigation, the sugar litigation for the government.

6 THE COURT: Thank you.

7 MR. FERGUSON: Your Honor, I might
8 call to your attention that our Paragraph X, an agreed
9 paragraph of both pre-trial orders, admits these
10 attorneys who have just announced themselves.

11 THE COURT: Yes, I intended to say
12 when everyone had been presented that I welcome all
13 of you to this litigation and look forward to becoming
14 much better acquainted with those of you whom I have
15 not yet had the privilege of meeting.

16 (To the Reporter) Please provide the clerk's
17 office with a list of all these names so that they
18 may be recorded as being counsel in this case. Thank
19 you.

20 MR. FERGUSON: The next subject on
21 the agenda, Your Honor, is the finalization of an
22 attorney's service list. Paragraph or Section XIV A(3)
23 provides that within ten days from this date of order this
24 will be done by the defendants' coordinating counsel
25 and the plaintiffs' steering committee secretary who
is, by the way, Mr. Cooper, as provided in the order.

1 THE COURT: That is excellent. Thank
2 you. The next matter.

3 MR. BOMSE: Defendants' Coordinator,
4 the next matter on the agenda is the establishment of
5 a generic title for the litigation. We propose In Re:
6 Coordinated Sugar Cases would be an appropriate
7 description of what these cases are all about. And
8 I think it fairly describes what we will be dealing
9 with here.

10 THE COURT: I don't know why we need
11 to have "coordinated." There is only one litigation of
12 this kind in the country at this time.

13 MR. FREEMAN: Should it be called
14 "Sugar Anti-Trust Litigation?"

15 THE COURT: Something like that. In
16 any event, it is a small matter, but we should always
17 keep titles to a minimum of words. We are going to
18 be typing it innumerable times and every little
19 shortening helps.

20 MR. KOHN: Harold Kohn. Item Number
21 (6), I think Mr. Bomse just read it. Perhaps we could
22 agree now and just call it "In Re: Sugar Industry
23 Anti-Trust Cases." That would eliminate the word
24 "coordinating." That would take care of what
25 Mr. Freeman had in mind and Mr. Bomse suggested.

1 MR. BOMSE: Why don't we be even
2 shorter, "In Re: Sugar Anti-Trust Cases."

3 THE COURT: I would agree. Now we
4 have it. All right, next.

5 MR. FERGUSON: The 1812 Distributing
6 case was not officially sent here by the panel, and
7 I think that that was because probably nobody was
8 quite sure just what the situation was. But the 1812
9 case is --

10 THE COURT: The reason, if you want
11 to know, was that the panel decided to leave it to
12 my discretion.

13 MR. FERGUSON: The 1812 case is about
14 two and a half years old, and a substantial amount of
15 discovery has been done. It covers, between the pre-
16 sent complaint and the supplemental or amended complaint
17 that we contemplate filing, virtually all of the
18 allegations contained in most of the complaints that
19 have been filed around the country.

20 We will come later to the discovery aspect
21 in this matter. But I think that I can say that while
22 there are some peculiarities in the northwest, as
23 there are in some of your other cases, generally the
24 same pattern is involved, and it does cover an area of
25 Chicago west, the California, Arizona, and the inter-

1 mountain areas as far as areas of discovery and areas
2 of allegations in the complaint. So that is the
3 situation as to 1812, unless some of the defendants
4 want to respond to it.

5 THE COURT: I should say that after
6 giving full consideration to the matter, I have
7 concluded that there is no reason why any of the north-
8 west cases, including 1812, should not be included in
9 this litigation. Therefore, it is now ordered that
10 they be in that status from this time forward and a
11 full participant in this multi-district litigation.

12 One of the problems in making that decision
13 was the fact that in the 1812 case, there has been
14 very substantial progress in discovery. When other
15 cases in the northwest were added sometime this spring
16 by my direction there was a procedure established for
17 bringing the new northwest cases up to the level in
18 discovery of the 1812 case. Believe it or not, that
19 was done very expeditiously. Indeed, it has been fully
20 completed up to now, largely by stipulations of one
21 kind or another by counsel in the new cases, after
22 seeing what had been done and having it explained to
23 them, they readily adopted and accepted as applicable
24 to their cases all the ~~had~~ gone before, with some minor
25 exceptions or modifications. That was accomplished in

1 a very short time mostly by conferences of counsel.

2 I will propose, when we get to it, that
3 something comparable to that be done in this litigation.
4 But we will resolve that later after you have had a
5 full opportunity to express your views on that subject,
6 which will arise later in this conference.

7 MR. LANG: Bailey Lang. Your Honor,
8 do I understand from your order that 1812 is now
9 actually transferred to this district?

10 THE COURT: That's right, by my
11 direction, although it will be followed with the usual
12 order of the panel. I noticed that 1812 was not
13 included. I called Mr. Cann (phonetic), and the
14 explanation he gave me at that time was that whatever
15 judge agreed to take over this extensive litigation
16 ought to have something to say about who is included
17 in it. That sounded reasonable to me.

18 Very well, the next item.

19 MR. BOMSE: Your Honor, the next item
20 on the agenda is 4, and I think under that Item 4B,
21 the matters as to which the parties are not in agreement,
22 the matters of principal discussion this morning.

23 THE COURT: We jump, then, down to
24 Item B; is that right?

25 MR. BOMSE: I think so, Your Honor.

1 THE COURT: That is the way I under-
2 stood it.

3 MR. BOMSE: Your Honor, would you like
4 me to begin to commence with the first of those items?

5 THE COURT: As you please. Go ahead.

6 MR. BOMSE: Your Honor, Steven Bomse,
7 Union Sugar Division of Consolidated Foods Corporation
8 and Coordinating Counsel for Defendants.

9 The first item is Paragraph IX, entitled
10 "Rules of Procedure." The disagreement there relates
11 solely to the draft, Your Honor, of defendants' proposed
12 Pre-Trial Order Number 1, Page 21.

13 THE COURT: Oh, yes, Page 21.

14 MR. BOMSE: Yes, Your Honor. The
15 difference there, if you have them both in front of you,
16 relates only to Paragraph C, in which we propose to
17 add, and it recites that the consolidated proceedings
18 are designated as complex litigation. And I think,
19 looking out over the people in the courtroom here, I
20 won't have to say very much more to convince you that
21 this is, indeed, complex litigation. Then it provides
22 that is subject to the Manual for Complex Litigation,
23 which will serve as a guide to all further proceedings
24 herein except as modified by the Court.

25 I think, Your Honor, this provision, which

1 is in our form of order and not in plaintiffs', comes
2 really directly from Your Honor's of June 9th, in
3 which you indicated that the manual, with which you had
4 so much to do in its formative stages, should be a
5 guide to us. And we think that it is appropriate that
6 this first pre-trial order so recite. That is the
7 substance of the disagreement.

8 MR. FERGUSON: Yes, Your Honor, knowing
9 that you were one of the principal editors of the
10 original manual, that you have kept it up to date, and
11 are still keeping it up to date, we thought that you
12 would be aware of what you were supposed to do and not
13 supposed to do under the manual. But the plaintiffs
14 felt that we should not raise this to the dignity of a
15 rule of Court, as such. But that you were aware of the
16 manual, that everybody knew you were aware of the manual,
17 and that we would try to follow the manual. Nobody is
18 contending that this litigation isn't complex. But it
19 is about like saying today is Tuesday.

20 So we just don't think it is necessary, Your
21 Honor. That is the difference.

22 THE COURT: I agree that it may not
23 be necessary, but I think it desirable to have it there
24 with another clause at the end. I thought I expressed
25 if fairly well in the letter in which I emphasized

1 that manual provisions are recommendations. The
2 Board of Editors, of which I have been a member since
3 the beginning and still am, have emphasized time and
4 time again throughout the manual that they are suggested
5 procedures. Indeed, language in the manual urges
6 that each individual judge feel free to modify the
7 recommended procedures, or even not follow them at all,
8 according to the particular circumstances of the litigation he is handling.

9 Unfortunately, some people who use the manual
10 don't seem to read all of it and have to be reminded
11 of its flexibility to meet exceptional situations.

12 I have many times modified the manual sua
13 sponte or upon application by counsel therefor upon
14 a showing of good cause. All I want to add at the end
15 is a phrase to remind all counsel that if they want
16 to propose a different procedure and can persuade me
17 that it is better than what the manual recommends it
18 will be adopted. I want, need, and solicit your advice,
19 assistance, and innovations. I want you to innovate
20 wherever necessary to shorten and speed up this litigation.
21 I am sure that you can come up with some ideas
22 that will be better than those prescribed by the manual
23 in this particular litigation and hope you do.

24 MR. DOMSE: Your Honor, I hope our
25

1 language has done precisely that.

2 THE COURT: No, I think we should have
3 a semicolon after "Court" and add the balance of the
4 sentence.

5 MR. FERGUSON: May I refer you to
6 your memo of June 9th and the language that is under-
7 lined there?

8 THE COURT: That's right, we can add
9 that sentence.

10 MR. FERGUSON: Can I read that into
11 the record?

12 THE COURT: Surely. Add the sentence.

13 MR. FERGUSON: "Counsel may apply
14 for any modification that is considered to be more
15 appropriate or expeditious than a procedure recommended
16 in the manual."

17 THE COURT: That is it. Next.

18 MR. BOMSE: Your Honor, the next item
19 is Paragraph XV, if I am correct, with respect to
20 preservation of documents and the establishment of a
21 document depository. It appears only in the plaintiffs'
22 proposed form of order, Page 28, Your Honor.

23 MR. FERGUSON: Maybe I should speak
24 on that first.

25 MR. BOMSE: May I suggest, Mr. Ferguson,

1 since there are two very separate thoughts here, that
2 we deal first with Paragraph A and then Paragraph B.

3 MR. FERGUSON: I would be very
4 happy to do that. Your Honor, yesterday we met with
5 the defendants and we were discussing the necessity of
6 preservation of documents. And we had presented to
7 them our suggestions. And the defendants indicated to
8 us that they didn't think it was necessary, that under
9 the law we are supposed to do this sort of thing. I
10 have been aware that people were supposed to do what
11 was under the law. Even lawyers ought to be reminded
12 of what the law is. So we feel, particularly, with
13 10 defendants here, with all kinds of factories and
14 documents scattered all over the United States, that
15 this is a very essential order that should be called
16 to their attention. It is regularly done in all cases
17 of this sort that such an order is entered; that it is
18 necessary, and that people are more inclined to obey
19 a written order than they are to obey some law that
20 they might be unfamiliar with. That is the reason for
21 it. We think it is very important. There are a lot
22 of documents. Some of these go back many years. There
23 is some very important documents that are being released
24 to these defendants from the Salt Lake City litigation,
25 which has terminated. These are very important to us,

1 and these are old documents. Maybe some of the only
2 old documents we can get our hands on. So it is very
3 important at this time that we have this order.

4 MR. BOMSE: Your Honor, Mr. Ferguson
5 is essentially correct in stating our position with
6 respect to Paragraph A under Section XV. And that
7 is that we do not feel that there was any need for
8 such a paragraph in view of the facts that the law does
9 impose upon us, as well as common sense in representing
10 our clients, does impose upon us an obligation to
11 retain documents which are relevant to this litigation.
12 And I think I can fairly assure this Court it is the
13 intention of counsel in representing their clients to
14 make sure that that is done.

15 In addition, I would point out to the Court
16 that under California law, at least, there is a specific
17 penal code section -- which I am unable to quote
18 verbatim -- but which I can represent does, in
19 substance, impose a requirement for retention of
20 appropriate documents.

21 Our problem with this proposal XV in addition
22 to the fact that we think it is unnecessary, is that
23 it would impose upon some very large corporations a
24 burden of retention of documents far beyond that which
25 anybody would otherwise contemplate. For example,

1 the phrase in here which is specifically defined,
2 requires us to retain any relevant document or other
3 relevant item. That is said to mean "Any document or
4 item . . ." and I am quoting here ". . . which appears
5 to constitute evidence or to contain information
6 relevant to any issue raised by any of the complaints
7 in these actions." Now, it seems to me, Your Honor,
8 that if an order that broad and that non specific is
9 entered here, the lawyers for the defendants are going
10 to have no choice but to advise their clients in
11 substance not to destroy any piece of paper, however
12 seemingly innocuous, any invoice, any purchase order,
13 any routine shipping document that might some day in
14 some one of these many cases -- and who knows how
15 many more are going to be filed and what they are
16 going to allege. Lawyers are going to have to tell
17 their clients "You have got to retain all that or you
18 may be violating Pre-Trial Order Number 1."

19 And I don't think that the Court ought to
20 impose that kind of a burden upon us here. It seems to
21 me, Your Honor, that if anybody goes out and can be
22 shown to have willfully destroyed some relevant document,
23 that the law provides in the form of instructions, the
24 law provides in the sanctions and the law provides in
25 the form of inferences which this Court can draw, that

1 those documents were relevant and they were destroyed
2 for an improper purpose. But I don't think this
3 kind of an obligation ought to be imposed at this
4 time.

5 If, however, Your Honor, you were inclined
6 to enter such an order, we suggest that at the very
7 least the phrase beginning on Line 4 "And all persons
8 in active concert or participation with them who receive
9 actual notice of this order by personal service or
10 otherwise. . ." should certainly be eliminated. That
11 is not a phrase which I can define satisfactorily for
12 myself. It isn't clear to me who this obligation is
13 being imposed upon.

14 These are, as far as I can tell, third
15 parties who are not going to be present here but who
16 may, in some way, become informed of this litigation
17 or informed of this order. And I think this would
18 impose a similarly onerous burden on them to retain
19 virtually any document in their files during the pendency
20 of all of these cases. And I can see no justification
21 whatever for including that kind of a limitation.

22 So our point, Your Honor, first we don't
23 think it is necessary. Second, if you were going to
24 enter such an order, it certainly ought to be modified
25 to eliminate the phrase that I have read in Lines 4
through 7.

1 MR. FERGUSON: Your Honor, if I may
2 respond. I am a little amazed --

3 (Off the record)

4 MR. FERGUSON: I am a little amazed
5 at the comments by Mr. Bonase. Yesterday we invited
6 the defendants to submit to our drafting committee any
7 suggestions and changes of language they had, and they
8 responded they were not interested in submitting such
9 language. The language at this particular section is
10 the language, was the identical language that was
11 admitted in Phoenix by Judge Muecke.. It is language
12 that is clearly understood. And the language he is
13 objecting to covers such people, for instance, as
14 para-legals or would cover a situation where there is
15 maybe some document in the warehouse that would have
16 an automatic destruct date. And we are trying to
17 protect against those kinds of things. I think it is
18 fair language. They had an opportunity to submit
19 different language and they chose not to do so. And
20 I believe we need that in the order.

21 THE COURT: Of course, I am familiar
22 with all of the sanctions, criminal or otherwise, that
23 may be imposed for the improper destruction of documents
24 or materials relevant to a lawsuit. And I am speaking
25 from recent experience in a class action case involving

1 several very fine law firms in the northwest in which
2 a vital and critical document which went to the heart
3 of the litigation was found to be missing. By a rare
4 good chance, a copy was discovered. Apparently someone
5 had removed and lost the original. I choose to put
6 an innocent interpretation upon it. I do not want to
7 take any hazard whatever of having such a thing happen
8 in this litigation. I want to protect you as well as
9 your clients against such a disagreeable experience,
10 and therefore want this Paragraph XV included in our
11 first pre-trial order. I recognize that document
12 destruction is this day and age is essential. I
13 suggest that liaison counsel get together on some kind
14 of a provision submitted for my approval, which will
15 specify certain types of documents that need not be
16 retained. Please work on that to minimize the
17 problem that defendants and others may have in retain-
18 ing numerous documents to the extent the problem can
19 be alleviated.

20 If counsel can't agree on a solution I will
21 provide one which may not be very satisfactory because
22 I think measures can and should be developed to meet
23 the problem.

24 So ordered.

25 Next?

1 MR. FERGUSON: The next order of
2 business, Your Honor, is our XV --

3 MR. BOMSP: Your Honor, before that is
4 done, I think there is a housekeeping matter that I
5 am not aware of. Mr. Lang calls it to my attention
6 that there may be in some of the cases, particularly
7 1812, an extant order respecting preservation of
8 documents. And I think there may be one in the case
9 in Illinois. May those be deemed rescinded and super-
10 seded by this new paragraph?

11 MR. FERGUSON: That will be agreeable.

12 THE COURT: From about 15 minutes
13 ago, they are inapplicable.

14 MR. FERGUSON: Now, coming to XV(B).
15 This provides that the plaintiffs and defendants were
16 to agree to meet to try to resolve the location of one
17 or more plaintiffs' depositories. And I have had
18 some little experience with the amount of documents
19 that may be produced in this case, and I would estimate
20 that we are probably going to be in the several millions
21 of documents.

22 I think it is going to be very important that
23 we have at least one depository. I have done a little
24 thinking about it and had a few discussions, and
25 probably the location of at least the first depository

1 should be in San Francisco. Previous experience
2 with respect to more than one depository has indicated
3 generally it doesn't work. It may be necessary, or
4 in this case it may not. But at any rate, I think
5 that we should have at least one depository. I think
6 we should try to meet with the defendants and try to
7 discuss where it ought to be. And this is the only
8 thing that this covers, just an agreement to meet and
9 discuss and have the principle of a depository
10 established. I think the principle is very good and
11 is necessary in this sort of litigation.

12 MR. FREEMAN: I would just like to
13 supplement what Mr. Ferguson said. One depository,
14 of course, is essential. But we also believe that
15 there should be a second depository in Chicago for
16 this reason: first, that we all know the distance
17 between Chicago and San Francisco and the difficulties
18 of travelling that distance to inspect documents.

19 THE COURT: What is it now?

20 MR. FREEMAN: The same distance that
21 it has always been, 2,500 miles.

22 THE COURT: I am talking about minutes.

23 MR. FREEMAN: Maybe now it is about
24 three and a half to four hours depending upon which
25 airline you use. But in any event, there is a large

1 volume of cases that have been filed in Chicago, and
2 the Chicago West Market is a very substantial portion
3 of this entire litigation. And for the additional
4 cost of establishing or making a second copy and
5 depositing it, it seems like it would be a very small
6 cost. Besides, both Mr. Burke and myself have empty
7 space that could be given over to this depository. So
8 there would be no rent problem involved, and subject
9 to everybody's accession.

10 MR. BOMSE: Your Honor, I am not sure
11 what we are really talking about on this one.

12 THE COURT: We are talking about
13 whether we should have a depository and if so, where.

14 MR. BOMSE: I understand that. But
15 the question, as I basically see it, is whether or
16 not in addition to a depository, that the defendants
17 are necessarily going to have to have a place in this
18 case for their documents and for the documents that
19 are ultimately produced by plaintiffs, for their use
20 in trial preparation in this case, organized in a way
21 that is going to assist them in trial preparation.
22 Also, we should bear the expense and burden of a joint
23 depository, and it doesn't seem to me that there is
24 any cost saving involved, any time saving involved,
25 or any benefit whatsoever. I am sure the plaintiffs

1 are going to want a depository. I am sure they are
2 going to want to be able to use it in a very effective
3 way. And they are going to organize it with regard
4 to the documents that they are going to need when
5 the case goes to trial. It is going to be their work
6 product, going to show how they are thinking about
7 these cases, what they think is significant. And
8 that is exactly what the defendants are going to have
9 to do. So if Your Honor orders a joint depository of
10 the kind that they are saying, we as the defendants are
11 going to have to, in effect, in addition to having the
12 depository, in all events we have to have it as a matter
13 of work product to help us prepare these cases. It is
14 not a question of just throwing 5,000,000 documents
15 in somewhere, numbering them serially from 1 to 5,000,000
16 and putting them in bookcases or filing cabinets
17 along the wall. It is a question of using, making a
18 depository that is useful. And what is useful to us
19 is not necessarily going to be useful to the plaintiffs.
20 And it seems to me that what ought to be done here is
21 when the documents are produced, let the plaintiffs have
22 their depository and organize it as they want. There
23 is enough of them, and they can split it up between
24 Chicago and San Francisco. With microfilming costs
25 the way they are, it is not too much more expensive

1 to make a second copy. But let's not have this notion
2 of a joint depository because we are not saving any-
3 thing. Your Honor says "let's save." I will represent
4 to the Court that if you make such an order, it is not
5 going to save the defendants any costs. It is not
6 going to save trees being cut down and turned into
7 papers because we are going to have to have a depository
8 of our own. It has got to be organized the way we
9 want it. And once we get our organization, we don't
10 want the plaintiffs knowing how we are thinking about
11 these cases. And I am sure they don't want us knowing
12 their thoughts. So I don't think it is really anything
13 to discuss. There should be a depository for them,
14 however they want it; a depository for us, however
15 we want it.

16 MR. GREENAN: Thomas Greenan, with
17 Ferguson and Burdell. In the recently concluded anti-
18 biotic litigation in the District of Minnesota, I
19 served as the chairman of the discovery committee. As
20 Your Honor may know, by order of the court in that
21 litigation, the court created a document depository
22 which the defendants located in New York. The problem
23 which Mr. Bomse has avoided here is that in these types
24 of cases, with several defendants and many, many
25 plaintiffs here -- I believe we have nine or ten

1 defendants -- in order for the cases to move along
2 as a coordinated vehicle rather than each case separately
3 going on its own way, it is going to be necessary for
4 the various steering committees to marshall their
5 forces. And that means getting lawyers from all over
6 the country and directing them to take on certain chores,
7 one of the most onerous of which is the examination of
8 documents.

9 It is going to be a practical impossibility to speed this litigation along if we are sending
10 people to nine or ten different locations. The process
11 that has been followed in other cases with a great
12 deal of success is a single depository, all of the documents
13 in one place, send the lawyers to the depository,
14 have them do the work there and the case will move
15 along much, much faster. Thank you.

16
17 THE COURT: Unless my memory is in
18 error, in the electrical industry litigation, which
19 had far more documents than probably will be involved
20 in this litigation, the depository was located in
21 Chicago because the judges thought that was the best
22 place for it. It was a joint depository, and we had
23 no complaint from anybody with that arrangement.

24 Again, I speak from experience. I think we
25 must have a joint depository, one depository, with such

1 provisions for the convenience of counsel and minimizing
2 of expense as the counsel may decide. Following
3 your suggestion, Mr. Ferguson, that the liaison counsel
4 get together promptly, if possible today, I would say
5 that I think the depository should be in San Francisco.

6 MR. FREEMAN: I agree with Your Honor.

7 THE COURT: I will listen to anyone
8 who wants to speak to the contrary, but I think this
9 is the logical place for it to be. But if counsel
10 have some better suggestion, I am open minded on it
11 and will be glad to yield to better advice, if I get
12 any.

13 MR. FERGUSON: The next item is a
14 matter of procedures for class determination, Section
15 XVI. And Mr. Freeman will speak on behalf of the
16 steering committee in this matter.

17 THE COURT: May I make just one
18 comment? I think I told both groups of you, but it may
19 be I was speaking off the cuff among friends and
20 neglected to do so.

21 I intend to follow the mandate in Rule 23
22 that class action requests shall be determined at the
23 earliest practicable date. Practicable means reasonable
24 with adequate time for briefing. That is my policy.
25 That is what we must do.

MR. FREEMAN: Speaking in that spirit, Judge Boldt, I am fully aware of the very direct communication we received from you several weeks ago. The plaintiffs, their steering committee and the entire group, sought to set out a procedure that would result in class action issues being presented to you as promptly as possible. And if you look at XVI of the plaintiffs group --

THE COURT: My assistants are feeding me these papers for which I am not yet ready.

MR. FREEMAN: The plaintiffs suggest that on or about September 8 they present motions, supporting briefs and affidavits in support for the certification of the requested classes and to the extent possible that they agree upon a joint and consolidated motion to eliminate whatever conflicts or overlaps exist between the classes, and in any event file a joint paper which will set forth the class situation as it exists among the various 40 or 50 cases that may be on file by September 8.

They then suggest that on October 10, the defendants shall file their answering briefs, their motions, their affidavits, and on October 30th we would reply, and the case would be ripe for class determination.

Now, the defendants have taken a different

track, and they suggest that we file our motion on September 25 instead of September 8. And then on October 28 that they file discovery with respect to the class action. And here is our major difference: in the cases that I have had experience in in the last five or ten years, these class actions have been determined, and in many instances in situations that are as difficult as far as class issues are concerned as this case, they have been determined on the basis of memoranda filed and affidavits filed by both sides.

The Court and the parties themselves have come to the conclusion that there was no need for hearings. There was no need for discovery. So, for example, Judge McGraw in the Northern District of Illinois in the Fleet Discount, a case of as large a magnitude as this and many complications, had presented to him by the defendants an immediate request for discovery. He calculated that this discovery request would take six months or nine months to complete as the defendants had outlined it. And instead, he asked for briefs and affidavits, and on the basis of the issues, factual issues being met in the affidavits themselves, with the plaintiffs largely conceding what the defendants had asserted in their affidavits, the class actions were promptly determined. The same thing

1 with Judge Blumenfeld in Connecticut and Judge Robson
2 in a class action suit which was vigorously contested.

3 Incidentally, in the three cases that I
4 know of where multiple class actions were involved
5 and which either have gone to trial or are going to
6 trial, the class actions were determined without hear-
7 ings; namely, the Cast Iron Pipe litigation by
8 Judge Pointer, the Fleet Discount case, which goes to
9 trial in the fall, and the Master Keys litigation
10 before Judge Blumenfeld which goes to trial this winter.
11 Those three cases all involve very complex class
12 action determinations. All involve defendants vigorously
13 asserting that they had to have hearings on the class
14 determinations, and all were determined by the Court
15 after adequate affidavits had been filed by both sides.

16 So my suggestion is it may become necessary
17 to have hearings on the class action issues in this
18 case, but we shouldn't have an order which actually
19 prescribes such discovery and hearings. We should first
20 proceed with the first step of having briefs and
21 affidavits filed, and on the basis of the joinder of
22 issues, both legal and factual, with those papers
23 the Court can then determine whether to proceed with
24 the hearings that the defendants seek.

25 MR. BOMSE: Your Honor, I would like

1 to make a brief presentation.

2 THE COURT: Yes, of course.

3 MR. BOMSE: Your Honor, I heard very
4 loud and clear what you said about having this matter
5 of class determination resolved at the earliest
6 practicable date. I am familiar with the rule. But
7 I also think I don't need to remind the Court that in
8 determining whether or not there are going to be
9 classes in this litigation, and if so, what those
10 classes are going to look like in configuration, the
11 Court will be making what is perhaps the single most
12 important decision in this litigation. And I know that
13 it has become very common practice among members of
14 the plaintiffs' bar -- and it is certainly under-
15 standable to treat these cases virtually at the outset
16 as if the fact that there are going to be classes is
17 a foregone conclusion and let's get on with it and
18 make that determination.

19 I reject that assumption. I think, Your
20 Honor, that we are entitled to the fact that Rule 23
21 imposes requirements for a class, that the plaintiffs
22 have the burden of satisfying those and that we are
23 entitled within the meaning of Rule 23 and decisions
24 interpreting it to make the showing that is pertinent.
25 And I think that there will be no intention of delay,

1 no intention of providing this Court with anything
2 but the relevant material. But Your Honor, the
3 defendants here think that at the very least they are
4 going to need some substantial discovery because when
5 we get that discovery, we will be able to show the
6 Court that this is not a case in which there should be
7 classes. Whatever assumptions the plaintiffs may
8 be making, whatever assumptions the Court may have,
9 we think we can convince the Court of that, or at
10 least the classes should be very narrowly confined.
11 And we think we can show the Court why that is appropriate.
12 But to do that. Your Honor, we are going to need a
13 reasonable period, first of all, to marshall our data
14 and second of all, to gather the data we need by way
15 of discovery.

16 Now, we are not thinking of a period of years,
17 a period of many months for this. What we have proposed
18 and indeed our proposal is now embodied in the
19 Paragraph XVI the defendants have submitted, Page 29,
20 came out of our discussions yesterday with plaintiffs.
21 And I believe Mr. Kohn advanced largely this suggestion.
22 I don't mean to falsely attribute a proposal to him,
23 but we had something quite different initially in our
24 draft. Mr. Kohn suggested this as a possibility, and
25 we went back and the defendants met and came up with

1 what we thought was an acceptable compromise. Then
2 we called Mr. Cooper, who was the secretary for the
3 plaintiffs' drafting committee and steering committee.
4 We were told, well, they weren't sure that was, in
5 fact, --

6 MR. KOHN: You should accept an offer
7 when it is on the table.

8 MR. BOMSE: I am not suggesting
9 anybody. All I am suggesting it was something put out,
10 something we were prepared to accept and something
11 we think is entirely reasonable.

12 What it provides is this, Your Honor:
13 September 25 --

14 THE COURT: Since the plaintiffs
15 are ready to do it on the 8th, why do you need that
16 additional time?

17 MR. BOMSE: The only reason the
18 paragraphs that have already been agreed to provide
19 that these cases will become at issue on September 25th,
20 and it seemed we ought to at least find out what is in
21 issue in the litigation before it is filed.

22 THE COURT: I don't think that is
23 of sufficient importance. If that is the problem, I
24 will advance the date of the cases being at issue. I
25 don't want to do that. I think we should take the

1 September 8th date. If the plaintiffs say they can
2 do it, they will have to do it. We will save 17 days.

3 MR. BOMSE: September 15th --

4 THE COURT: Seventeen days is a long
5 time.

6 MR. BOMSE: The major matter, Your
7 Honor, is what happens at that point. And we have
8 proposed, picking up Mr. Kohn's suggestion, at that
9 time we should commence, after we see what the plaintiffs'
10 assertions are, discovery, on time. We will file the
11 request for discovery. There will presumably be
12 some interrogatories, probably some deposition notices
13 with respect to the plaintiffs, and we will get to --
14 we are going to note it and Your Honor will see that
15 it will be done quickly. And if the plaintiffs have
16 no objections, they don't throw roadblocks in our way,
17 we will complete it very quickly.

18 If they do so, Your Honor, that is their
19 doing. The delay will not be anything we have caused.
20 Then at that point, when the discovery is essentially
21 completed, the parties I am sure will be able to get
22 briefs in, get affidavits in, get depositions or what-
23 ever evidentiary material submitted, and we can bring
24 the matter on for hearing in a relatively brief time.

25 All we are asking, Your Honor, is the

1 opportunity to take discovery to which I think is a
2 matter, not only a fundamental fairness, perhaps, as
3 a matter of law, certainly as a matter of logic in
4 these kinds of complex cases, we are entitled to have.
5 And I submit that our proposal is a fair one, although
6 Mr. Bleakley would like to add what comments he has.

7 THE COURT: Yes, Mr. Bleakley.

8 MR. BLEAKLEY: Yes, Judge Boldt,
9 Peter Bleakley, Great Western Sugar Company. I would
10 like to make just one additional comment to demonstrate
11 why it is absolutely essential for the defendants to
12 have the opportunity to take some limited discovery
13 on the class action question.

14 THE COURT: I am going to give you an
15 opportunity to state that with particularity, be assured
16 of that. Not that I am granting it, but I want you
17 to state it and why you need it, in a written memorandum
18 if that would shorten your remarks.

19 MR. BLEAKLEY: I think I can state it
20 in two minutes.

21 THE COURT: All right.

22 MR. BLEAKLEY: It is apparent that
23 a very substantial number of the named plaintiffs in
24 this case and the absent class members who they claim
25 to represent are indirect purchasers of sugar; that is,

1 they do not buy sugar directly from any of the
2 defendants in this lawsuit. I say that is apparent,
3 but it must nevertheless be established for us to make
4 an argument which is by now well established law. And
5 that is that indirect purchasers may not maintain a
6 class action under Rule 23. That is the position we
7 will argue. We will present what we believe is over-
8 whelming legal authority that a class action may not be
9 maintained on behalf of indirect purchasers. In order
10 to establish that fact, that someone is, indeed, an
11 indirect purchaser and is not a purchaser directly
12 from one of the defendants, we need to ask certain
13 limited interrogatories and probably take some limited
14 depositions. I point this out only as an example of
15 why, in order for us to make our arguments, we must
16 have some limited interrogatories. These will be
17 interrogatories that will be very easy for the plaintiffs
18 to answer. There will not be that many of them. It
19 will not require any massive work on the part of the
20 named plaintiffs, nor will the depositions. But we
21 must have this information in order to make our case
22 on the class action issue.

23 THE COURT: I am not trying to fore-
24 close you, but I do not want to hear argument on the
25 merits because I am going to give you an opportunity

1 to state with particularity what it is you claim you
2 need after you have got the plaintiffs' memorandum
3 or the matter on or about the 8th of September. I
4 wouldn't think of denying you such an opportunity,
5 even if right now I thought your position unmerited
6 which certainly I do not, but assuming I did, I would
7 still be obliged in fairness to give you an opportunity
8 to present your views.

9 MR. BLEAKLEY: Yes, sir, that is all
10 we want.

11 MR. FURTH: Your Honor, my name is
12 Fred Furth. I am from San Francisco. I have not had
13 the pleasure of working with Your Honor, although
14 your reputation is well known to me, and I am going
15 to enjoy it, I am sure. I was told, Your Honor, to
16 be brief, and I was. They said, "Don't be your usual
17 self in front of Judge Boldt."

18 It was real sweetness to my ears to hear
19 Your Honor say in our meeting that you believed in the
20 determination of class action at an early point in the
21 litigation. I am the one plaintiffs' lawyer that
22 though Eisen was a great victory. And I thought it
23 was a great victory because in that opinion the
24 Supreme Court says, both in the majority opinion and
25 in the dissent, that judges ought to stop this nonsense

1 about all these many trials to get a class declared.

2 Now, I respectfully submit that our order
3 ought to be accepted. If they have facts -- and
4 they know this industry. They have been in it for
5 100 years -- if they know facts, they can put them
6 in an affidavit. Now, if we want to scream bloody
7 murder thereafter that these aren't the facts or that
8 we disagree, we will have to be running to Your Honor.
9 But they know what the facts are. They know who buys
10 directly from them. They know who buys indirectly
11 from them, and it is nonsense to have discovery. They
12 can put it in an affidavit. They have got experts.
13 They have got everybody. At that point in time, if
14 we think that fact is relevant and disagree, then,
15 Your Honor, we can respond by asking for discovery.
16 Thank you.

17 THE COURT: By "everybody" I assume
18 you mean a Notary Public.

19 MR. FURTH: Yes, Your Honor.

20 MR. KOHN: Harold Kohn. With regard
21 to what Mr. Bomse said, what I believe that I suggested
22 in a moment of over conciliation was that defendants
23 shall file, as we have it in our Paragraph XVI, any
24 answering briefs, which may include, among other items,
25 what they have asked for in their XVI; in other words,

1 such discovery as they deem appropriate.

2 Then, as Your Honor indicated, you will have
3 the issues spelled out, and if some discovery is
4 necessary, at that point you can determine what dis-
5 covery they need, so that I would simply supplement
6 our XVI, if it is agreeable to the others and to Your
7 Honor, by stating that that is one of the items that
8 they can mention at that time.

9 My experience has been that there is nothing
10 so futile as discovery by the defendants of plaintiffs
11 in a class action motion. In effect, it is sort of
12 like fraternity hazing and serves about as useful a
13 purpose. In order to be a class plaintiff, you have
14 to be hazed by the class action interrogatories. And
15 they never thereafter see the light of day. For
16 example, what Mr. Bleakley referred to. Everybody in
17 this room, with the exception of perhaps Mr. Bleakley,
18 knows that for the last 15 years, courts have determined
19 classes of indirect purchasers, there is no such bar.
20 If there were such a bar, it is not a matter which
21 under Eisen you could consider at this time. It goes
22 to the merits of the right to recover. And finally,
23 I think every plaintiff's counsel here would be willing
24 to stipulate if he does have indirect purchasers in
25 his class, that he does have indirect purchasers, and

1 there is no need to spin our wheels with interrogatories
2 as to whether people are indirect purchasers. So if
3 that is the sort of thing that they would say in their
4 memorandum, that they need by way of discovery, I
5 would think Your Honor would turn that discovery down.
6 And we would agree that there are certain of us who
7 are indirect purchasers. So that that is, in essence,
8 what I did propose yesterday to Mr. Bomse. And I
9 think that is the workable way. And I think it is
10 what Your Honor, in effect, has suggested. And I
11 think most plaintiffs would be willing to go along with
12 that arrangement.

13 MR. BOMSE: Your Honor, may I just
14 close with one brief comment?

15 THE COURT: Of course.

16 MR. BOMSE: I think Mr. Bleakley, of
17 course, is right in pointing out one aspect of
18 discovery that we are going to need. But I don't
19 think he was intending to exhaust it. I don't want
20 to burden the Court with telling you what all the
21 discovery is and why we need it because Your Honor has
22 already said we are going to have a chance to address
23 that issue. But I think the important point for the
24 present purposes is, Your Honor, that there is more
25 to a class determination than simply taking the ipsa dicta

1 of counsel that there are common questions, that there
2 is numerosity and all of the various requirements of
3 Rule 23, have been satisfied. And I think we should
4 be given a chance in litigation of this magnitude to
5 make a fair showing to this Court. And that is all we
6 are asking for. And I suggest that it should be done
7 by permitting us to file our discovery, Your Honor,
8 and then see with particularity what it is that we want.
9 And if it is not relevant, Your Honor will tell us we
10 are not entitled to it. Let us get on file, and I
11 think it will become self evident. If plaintiffs say,
12 "Okay, we stipulate that all the facts you are seeking
13 are so," then there is no problem. But, on the other
14 hand, if they don't -- and I don't suspect they will
15 -- we are going to establish facts, I believe, that
16 would show that there are no classes. We ought to
17 be entitled to that discovery. I am not talking about
18 discovery on the merits of the case. I am talking
19 about discovery that goes to the question of whether
20 or not there should be classes here. And the manual,
21 as Your Honor is certainly better aware than I, provides
22 that in many cases there will be separate discovery
23 related to the class action issue -- I refer to
24 Section 140 of the manual.

25 THE COURT: Most of what has been

1 said on either side of this proposition I have heard
2 many times because I have ruled upon many applications
3 for class actions, some of them approving, others
4 denying. But I don't mean to preclude repetition
5 because it could be that I have forgotten some things
6 and need to be reminded. I am only trying to get on
7 with the business at hand. If I seem to have been
8 impolite or discourteous, I didn't mean it that way.
9 As a matter of fact, tomorrow in Tulsa I am going to
10 have to listen to all this again. I have just read all
11 the briefs in that litigation and have a pretty good
12 idea right now what the determination should be. But
13 I am going to permit oral argument on it against the
14 possibility that somebody will come up with a new idea
15 that I have never heard before and should give
16 consideration to.

17 Another thing: and the editors of the manual
18 are well aware of and are concerned about several aspects
19 that have developed in class action litigation. So
20 the defendants should keep to a minimum emphasis upon
21 situations that the manual editors will be considering
22 some time in August. We are going to have a great deal
23 of material to review submitted by both plaintiff and
24 defendant lawyers before we make additions or modifica-
25 tions in the manual on that subject. I will be there,

1 God willing, listening and perhaps contributing a
2 thought or two, and should be familiar with all points
3 of view.

4 To begin with, we should start with this
5 September 8th day. Now, what is a reasonable time,
6 Mr. Bomse, for the defendants to serve and file their
7 memoranda responsive to the memoranda of plaintiffs
8 on this subject, together with defendants' identifica-
9 tion of the type of discovery they claim they must have.
10 How much time is going to be needed after September 8th?

11 MR. BOMSE: Your Honor, it
12 appears to me that if we are going to be of assistance
13 -- and I certainly don't mean to argue with the Court
14 in terms of disposition in this matter -- but if
15 we are going to make a reasonable submission on the
16 merits of the class action issue, we have got to have
17 our discovery first. And so what I would propose --

18 THE COURT: I am not going to
19 do it that way. I want you to make your response,
20 stating with particularity the information that you
21 say you need or believe you need in order to fairly
22 present your point of view on the matter of class
23 action.

24 Now, how much time? I notice that in your
25 order you have allowed 30 days, or one month, to

1 gather that material together. Is there any reason
2 now that you can't do that in the same length of time?

3 MR. BOMSE: Yes, Your Honor. I think
4 there is.

5 THE COURT: Is there a reason that
6 you can't do it now, but could when you drew this to
7 propose it to the Court? Tell me about it.

8 MR. BOMSE: Your Honor, if I may,
9 what we have proposed in our order is that we would
10 be filing our discovery within 30 days, and we could
11 do that, and we can do that, if Your Honor will permit
12 us to. But if we have got to in addition be filing
13 a memorandum addressing the merits in some way in
14 addition to specifying, getting prepared our discovery,
15 it seems to us that we would need an additional month.
16 What I would hope Your Honor would consider favorably
17 in a case of this magnitude is that we should get our
18 discovery on file within 30 days and follow that up,
19 30 days later, before the discovery is in but while
20 it is at least pending, so we can be under way. I think
21 that is consistent with what Your Honor has in mind.
22 Let us file our discovery on October 8th, a month later,
23 and follow that up on November 8th with our memoranda.
24 And I think that would be an efficient way to proceed.

25 THE COURT: That is too long. I can't

1 allow that, Mr. Bomse. There is no reason why defendants
2 cannot start right now to prepare almost everything
3 they wish to present, perhaps not everything, but
4 nearly so. Indeed, I gather from Mr. Bleakley's
5 comments that he has done extensive research into the
6 authorities on this subject and was prepared to fully
7 present defendants' position here today. I assume
8 he has done considerable research because surely he
9 wouldn't make such emphatic representations to the
10 Court without having substantial grounds for doing so.

11 I don't know of any reason at all why almost
12 everything you need to do to respond to plaintiffs'
13 memorandum couldn't be done between now and the 8th of
14 September. All that you will need will be whatever
15 new matters come into the picture by reason of the
16 plaintiffs' presentation, and that should not take
17 any more than 30 days in my judgment.

18 Now, this is what we will do: we will fix
19 that date; namely, one month from September 8th --

20 MR. FREEMAN: October 10th is the
21 right date.

22 MR. FERGUSON: October 10th.

23 THE COURT: October 10th, with this
24 caveat that if you can show good cause, after you see
25 what you get on the 8th of September, by a telephone

1 conference call, I would consider extending the time
2 to whatever extent seems appropriate. But the burden
3 will be upon you to show good cause with particularity.

4 MR. LANG: Vacation, perhaps?

5 THE COURT: Lawyers are entitled to
6 vacations, but not at times when important duties
7 should have priority.

8 MR. MADISON: James Madison. Mr. Bomse
9 spoke of the original application, envisioning 30 days
10 just for discovery. I think he may have temporarily
11 forgotten that the schedule was really keyed into the
12 time when it was envisioned the defendants would be
13 completing their filing of answers. There are some
14 defendants in this case who have many more answers
15 than my client has to file. I think there are some
16 defendants in every case, and there are at the present
17 time we have 40 answers somehow to prepare.

18 It is also true that between now and
19 September, Labor Day, we are in the period in which
20 the staffs in our various offices are going to be
21 desseminated by vacations. I would respectfully ask
22 that Your Honor's date for filing of the responsive
23 brief and in a show cause in re discovery that the
24 defendants might want in regard to the class action
25 motion be retained at the original October 25th.

1 THE COURT: I just cannot do that.

2 I don't think it is necessary. Apparently plaintiffs
3 are prepared to do all of the things they think are
4 necessary to support their position. If and when you
5 make a showing of good cause, after you have gotten
6 their memorandum by the 8th, it seems to me you could
7 properly prepare a response by somebody in the office.
8 Everyone does not take a vacation at the same time.
9 With the numerous counsel for the defendants in this
10 case, you mean to say that there can't be some of them
11 working on this particular thing during the next several
12 weeks? I just can't agree with that.

13 We must have, right now, an understanding
14 that it is not necessary in my opinion that all
15 defendants' lawyers and all plaintiffs' lawyers work
16 on the same thing at the same time or even in sequence,
17 which is worse. Your steering committee must organize
18 your work so that everyone will bear a fair share of
19 the load, and possibly the fees on account of it, that
20 is a minor thing as far as I am concerned. You have
21 got to do that. If you do that in this situation, I
22 can't see how you can have any trouble. But if you do,
23 I will save you if you can show me good cause. In
24 other words, I am not acting upon anybody's suggestion
25 of what they can or cannot do, even my own. I may be

1 in error. I often am. I quite readily acknowledge
2 it, too, you will find. So I think that the time for
3 response to the plaintiffs' September 8th memoranda
4 on the subject of class action should be on or before
5 the 10th of October. It could conceivably be filed
6 earlier. You always should put "on or before," to remind
7 people that they don't have to wait until the last day.

8 MR. KOHN: The 8th.

9 THE COURT: In fixing dates, I always
10 give the benefit of the weekend to the diligent. You
11 get Monday. You have the weekend to polish the apple
12 if it needs polishing. If, at that time or before
13 that time, you see that something has arisen that you
14 consider is sufficient cause, contact your counterpart,
15 get on the telephone, tell me about it, get as many
16 attorneys together as want to participate to listen
17 in, and we will settle it. If you can make a proper
18 showing, I will extend the time, but it will be
19 a short time, the minimum necessary to do the job.

20 (Off the record)

21 MR. BOMSE: Your Honor, I don't want
22 to wear out my welcome this early in the proceedings,
23 but I think Your Honor suggested that you at least
24 consider respectful arguments, and we will certainly
25 abide by whatever rulings you make. I just would like

1 to point out to the Court, in regard to your observa-
2 tion that there are a lot of lawyers here. There are,
3 of course, some criminal cases now pending that are
4 also occupying a good deal of our time at the present.
5 And I hope the Court will at least bear that in mind.

6 THE COURT: I certainly have it in
7 mind, but it still leaves quite a few that aren't
8 involved in the criminal litigation.

9 MR. BOMSE: Your Honor, none of the
10 lawyers representing my client can make that claim,
11 unfortunately, and indeed some of us unfortunately
12 have other responsibilities as well.

13 THE COURT: Why don't you put that
14 in your showing of good cause, if it actually is a
15 cause.

16 MR. BOMSE: Your Honor, we certainly
17 will do that.

18 THE COURT: If it exists.

19 MR. RAVEN: Your Honor, Bob Raven. May
20 I make this suggestion, Your Honor. As it now stands,
21 the plaintiffs have two months and we have one month.
22 Can we at least split the time? They can get their
23 papers in in six weeks. Your Honor was suggesting that,
24 and that gives us as much time as them. I think that
25 is equal.

1 MR. FREEMAN: We will need --

2 THE COURT: What you would say, then,
3 would be that your response, instead of October 10,
4 would be October 24.

5 MR. RAVEN: Our response would be as
6 Your Honor wants it, on October 10. But their initial
7 papers would be earlier. They would be two weeks
8 earlier. They would be in late August. In other words,
9 we would split the time right down the middle, three
10 months we are talking about.

11 MR. FREEMAN: No, we couldn't do that,
12 Your Honor, because the defendants have ten companies
13 with maybe 200 lawyers. And if you count their offices,
14 it is 500 laweyrs. But the plaintiffs are 40 in number,
15 40 different cases, which have to be harmonized. We
16 will have to have steering committee meetings and then
17 meetings with all of the plaintiffs in order to evolve
18 what we are seeking to do as a joint presentation on
19 the class action rather than separate presentations by
20 each one of the plaintiffs. And I think we have tried
21 to be as diligent as we can. And you will find in the
22 future, Your Honor, that we are going to be pushing,
23 the same as you are, for a speedy determination of this.
24 September 8th seems appropriate.

25 THE COURT: I am not going to hear

1 any more on this. There comes a time when the law of
2 diminishing returns applies. I am going to continue
3 with what I said; namely, that you will respond on
4 or before October 10, with a proviso that you may apply
5 for extended time prior, of course, to that date when
6 you can conscientiously present a reason for a continu-
7 ance of the time for your response. I don't know what
8 more you can possibly ask for than that. You have my
9 word of honor that I will extend it if the showing you
10 make seems to justify it. Meanwhile, do your best
11 not to have to make that application. That, I think,
12 is reasonable, and that is the ruling.

13 Now, I think you understand, and if you don't
14 I will clarify for all of you right now. When you
15 have submitted your response with the plaintiffs'
16 showing, that the plaintiffs should have a reasonable
17 period, which would be very short, for a reply. It
18 should be 10 days.

19 MR. KOHN: Agreeable.

20 THE COURT: By the way, I wish to
21 say now: every time you file a paper here mail two
22 copies to me at Tacoma; one for me and one for my law
23 clerk. We keep separate files, so each of us always
24 has copies of all documents that are filed. Please do
25 that and you will save the clerk from being involved in

1 it. Right?

2 Now, when all the memoranda on class actions
3 have been submitted, I will then review the matter of
4 the memoranda to decide whether or not oral argument
5 should be permitted. In general I lean in favor of it,
6 excepting only in those matters in which I am convinced
7 that it is not required because the showing made in
8 the memoranda is sufficient for making a ruling on
9 the particular motion.

10 MR. FERGUSON: We have included it in
11 Paragraph IX(b).

12 THE COURT: I want that in. When we
13 started this practice in the Western District of
14 Washington several years ago, we got quite an awful
15 hue and cry from the bar about it. We did not revoke
16 the rule, and pretty soon everyone came to realize
17 that it saved a lot of time, effort, and expense for
18 litigants and was a good thing because we have been
19 very reasonable in applying it; namely, when there is
20 a vital issue, as is a class action motion, and there
21 is reasonable belief that counsel might in oral argument
22 enlighten us better than we have been, we hear oral
23 argument. I will rule on a request for oral argument
24 upon review of the memoranda and when granted set a
25 date for it that is reasonably agreeable through the
steering committee.

1 This business of fixing dates is always a
2 difficult problem, and I like the attorneys to attend
3 to it and not me. I will give you the earliest dates
4 I can, and that is when we will hear the argument if
5 authorized. This will be the rule on class action. In
6 the plaintiffs' part you can add anything to that you
7 want to add, to and including the ruling I have made.
8 Is that reasonably satisfactory to everybody?

9 MR. FERGUSON: Right, Your Honor.

10 THE COURT: Done. Now, does anyone
11 want to take about a ten minute break?

12 MR. FERGUSON: Just one second. Your
13 Honor mentioned the Western District of Washington rule.
14 It is included in this order in Paragraph IX(b), Your
15 Honor, and I say the Judge's request for the Western
16 District of Washington has been included in this order
17 in IX(b).

18 THE COURT: Thank you. Now, would you
19 like to take a break at this point?

20 MR. FERGUSON: Five minutes is ample.

21 THE COURT: All right, five minutes
22 as near as you can make it.

23 (Recess)

24 MR. FERGUSON: The next matter on the
25 agenda is B(4) which is the propriety of an order

1 directed to grand jury documents. I don't think that
2 anybody has to tell you very much about grand jury
3 documents. I remember the amount of time you spent
4 in the rulings you made in the electrical industry
5 cases, the flour case recently, and many others. But
6 I am going to -- I will remind Your Honor that the
7 documents are in San Francisco. The grand jury sat
8 in San Francisco, but Harold Kohn has a few words that
9 he wants to say on this subject. Harold is going to
10 speak on behalf of the steering committee.

11 MR. KOHN: It is the 13th anniversary,
12 Your Honor, that you and 17 other judges ordered them
13 turned over in the electrical cases. I think ever since
14 then when the issue has come up every judge has ordered
15 them turned over. It imposes no burden at all on the
16 defendants, really, because they obviously have copies.
17 They are obviously easy of access, and it starts us off
18 with what certainly is a mass of critical documents.
19 And we just respectfully urge that you do what has
20 been done almost as a matter of routine in the last 10,
21 12 years.

22 MR. BOMSE: Your Honor, with respect
23 to this matter, Mr. Brozney (phonetic) would like to
24 say a few words.

25 MR. BROZNEY: Robin James Brozney from

1 San Francisco. Your Honor, Mr. Kohn has said it was
2 always done, and yet we have not briefed the point.
3 Our position is we would like the opportunity to brief
4 this point to Your Honor. We are conscious -- every-
5 body in the room is conscious -- of the liberality one
6 uses in getting documents. And yet here the only
7 designation are those documents produced to the grand
8 jury. We have pending criminal cases, which are of
9 great concern to us in many ways. We would move as
10 expeditiously as Your Honor would care to move on the
11 briefing point. We would simply like a date to brief
12 it and present authorities to Your Honor and argue it.
13 And we would hope -- all we are talking about in this
14 area is the right to brief it. We would hope that
15 Your Honor would set it up in that way.

16 THE COURT: I would like to hear from
17 Mr. Staal. Mr. Staal, do you care to make any comment
18 in this area? This is one of the matters that is
19 directly within your interest.

20 MR. STAAL: Your Honor, I think we
21 believe that the grand jury documents are in a different
22 posture than the transcripts. I think the case law,
23 as we understand it, is when the documents are independ-
24 ently sought by a third party that Rule 6(E) does not
25 apply. Our only concern would be that we don't want

1 the parties to examine our copies of those documents.
2 We hold the originals, and that would be a great adminis-
3 trative --

4 THE COURT: I don't think he contem-
5 plates asking to see the originals.

6 MR. STAAL: We have no objection, under
7 the federal rules of criminal procedures, 6(E), as far
8 as obtaining the defendants' copies from the defendants
9 is concerned. But of course we feel differently about
10 grand jury transcript. We think the case law would
11 bear out that distinction.

12 THE COURT: I am not quite sure of
13 what you are saying. Could you clarify this, please?

14 MR. STAAL: As far as Rule 6(E) of
15 the Federal Rules of Criminal Procedure is concerned,
16 I think the case law will show that if the documents
17 produced before the grand jury are sought in and for
18 themselves and not for the purpose of finding out what
19 use was made of them before the grand jury, that then
20 the secrecy provision of Rule 6(E) does not apply.
21 That is my understanding of the law.

22 THE COURT: I understand your position.
23 I am not sure about it, but I understand your position.

24 MR. STAAL: In any event, the government
25 has no objection to the order as stated here, which

1 attempts to seek copies from the defendants of their
2 own documents.

3 THE COURT: Do you have a response?

4 MR. KOEN: The other matter I think
5 he is talking about, sir, is the transcripts of the
6 testimony before the grand jury, which we are not at
7 this time requesting.

8 THE COURT: That is what I understand,
9 and of course, they are not requested now. They are in
10 a different category. I have some understanding of
11 this subject, having been through the problem extensively
12 and having been affirmed in four different circuits
13 on one phase of it, with only one dissent.

14 Did you want to add something?

15 MR. BOMSE: Your Honor, simply that
16 our position is we should at least be given a chance
17 to brief the matter.

18 THE COURT: All right, done. I think
19 that that should not take a great deal of time,
20 Mr. Bomse, don't you agree?

21 MR. BROZNEY: I agree, Your Honor.

22 THE COURT: What are you thinking of
23 in the way of getting your memorandum out?

24 MR. BROZNEY: Whatever Your Honor fits
25 into the schedule would be fine. We will accommodate

1 ourselves.

2 THE COURT: I know it is summertime
3 and some people get to go fishing.

4 MR. BROZNEY: As a matter of fact, I
5 am about to leave town, not that that should hold up
6 60 lawyers, but if two weeks --

7 THE COURT: Are you in charge of doing
8 that job?

9 MR. BROZNEY: I would be, yes, Your
10 Honor.

11 THE COURT: Why don't you go ahead
12 and do it before your departure and turn it over to
13 somebody to finish it.

14 MR. BROZNEY: I would be happy to do
15 that.

16 THE COURT: Let's make it two weeks,
17 then.

18 MR. BROZNEY: Thank you, Your Honor.

19 THE COURT: Two weeks from this date.
20 That would be July 22nd. Serve and file with the usual
21 copies to me. How much time do you want for a response?
22 One week thereafter? What is the date?

23 MR. BOMSE: Tuesday, the 29th.

24 THE COURT: Is that all right?

25 MR. KOHN: Surely, Your Honor.

1 THE COURT: All right, done. And how
2 much for reply?

3 MR. BROZNEY: A week, five days, would
4 be fine.

5 THE COURT: Five days, all right. Then
6 the next day, 6 days would give you the weekend.

7 MR. KOHN: If they would begin to
8 let us look at them, I think it would help us along.

9 THE COURT: When the memoranda are
10 submitted, I may make a ruling on the memoranda. But
11 if after all the memoranda are in, including your final
12 reply, you request oral argument, I will seriously
13 consider it.

14 MR. BROZNEY: I understand what Your
15 Honor is saying. Thank you.

16 THE COURT: Thank you. That concludes
17 that subject.

18 MR. BROZNEY: Yes, Your Honor.

19 MR. FERGUSON: The next subject, Your
20 Honor, is discovery schedule, which is plaintiffs
21 Number XVIII, and in that connection, in connection
22 with the discovery schedule, we would like to work out --
23 in the 1812 case, you know, we have a protective order,
24 and we want to be able now to work with all of these
25 plaintiffs so that, as you have done in the northwest

1 cases, everybody can try to get caught up to date.

2 We have a schedule of discovery in the 1812
3 case, which is agreed, stipulated production of docu-
4 ments deal. We would like to expand that schedule to
5 include all of the cases, so that they can all partici-
6 pate. So that they won't have to -- the defendants
7 won't have to produce documents more than once. What
8 we would like to do is get the thing organized and we
9 can get our steering committee functioning properly.
10 We would like to get committees working on this thing
11 so that we can have an on-going discovery of, certainly,
12 liability, at least libability during the same period
13 of time that some of the people are working on class
14 action. We want to have this litigation proceed. We
15 don't think anything that has been agreed to be done in
16 the past shouldn't be done in the future. So if they
17 could do it for us, they can do it for everybody. And
18 as soon as the document depository and all those things
19 are organized, I think we ought to get on with the full
20 blown discovery schedule. And this is the beginning
21 of that schedule.

22 MR. BOMSE: Your Honor, of course we
23 can only take up these matters seriatim, A, B, C, right
24 down the line, or 14, 15, 16. But I think at this
25 point, Your Honor has already -- and properly so in
the interests of getting this litigation on -- imposed
a number of burdens on the defendants in terms of thing

1 that are going to require their time, the class action
2 issue, briefing the grand jury documents, and so forth.
3 I have already reminded the Court of the fact that we
4 do have these criminal cases which are on-going, and
5 I can assure the Court they are taking every bit as
6 much time as even the civil cases. Even though there
7 are only two of them pending.

8 Your Honor, I also cannot speak with any
9 precision as to the 1812 case discovery. Since I am
10 not in that case, I don't really know the details about
11 it except as Mr. Lang, Mr. Raven and some of the others
12 have related them to me. And maybe they will want to
13 supplement my remarks. But it seems to me, Your Honor,
14 in the light of what has gone before, that what is
15 appropriate this time is that we ought to take your
16 suggestion as to what happened in 1812, and you should
17 direct the parties soon after this hearing -- first
18 of all, the defendants have to get together. We have
19 got to learn what all has gone on in that case. Then
20 it seems to me we ought to get together with the counsel
21 for the plaintiffs and see if perhaps, as was done and
22 said in the two other cases that were filed in the
23 northwest, some kind of an agreement can't be worked
24 out. And if it can, then we will save Your Honor the
25 problem of resolving intentions among counsel. And I

1 think we have shown evidence here, even though you are
2 getting all the disputes, what you got at the very
3 beginning was a long list of things on which we did
4 agree. And I think we can probably make some progress
5 there. And if we can't, we will come back in. Your
6 Honor has already said he is always available, and one
7 way or another we can resolve these things, and we can
8 begin to take up these questions about discovery.

9 THE COURT: You are speaking, I assume,
10 primarily of the dates in plaintiffs' XVIII.

11 MR. BOMSE: I am speaking to more than
12 that. I think, Your Honor --

13 THE COURT: What?

14 MR. BOMSE: In some sense, first of all,
15 XVIII is not -- well, I take it XVIII(A) does purport
16 to deal with the question of exchanging discovery. That
17 has already taken place. I am not sure it adequately
18 deals with the subject of the 1812 case, and as I say,
19 this is something which comes upon me, at least today
20 for the first time. And I would hate for the Court to,
21 in essence, make an order which would bind me to some-
22 thing when I don't even know really what I am getting
23 into. And I would really urge the Court simply to direct
24 us to get together. You have given us a number of tasks
25 that you have to perform, and I assume that,

1 working diligently, it is going to take the time of
2 the lawyers here, particularly when you keep in mind that
3 some of us would like to be on our vacations. As a
4 matter of fact, I am on my vacation now, Your Honor.
5 Lovely place to be vacationing, in the Federal Building.
6 At least they have windows in here. The courtrooms
7 don't even have that. I would hope that, all things
8 considered, the rulings that have been made today
9 requiring us to do things, the fact that it is summer,
10 the fact that there are the criminal cases pending as
11 well, and the fact that Your Honor has made this ruling
12 in 1812, would encourage the Court to direct the parties
13 to get together to see if now they can't agree on what the
14 discovery should encompass. Certainly, we have offered
15 to the Court what we think was a reasonable schedule with
16 respect to first wave discovery in our Paragraph XVIII,
17 which is on Page 30 of the defendants' proposal. Whether
18 the Court wants to adopt ours or wants to instead direct
19 us to get together, I leave to the Court. But I think
20 at least at some point comes a limit to what can reason-
21 ably be required. And I have a feeling that if we are
22 directed to sit down, we can establish among ourselves
23 what is reasonable. I know that the plaintiffs were
24 fairly reasonable yesterday in a number of items, and
25 I think Your Honor has indicated --

1 THE COURT: The defendants were, too.

2 MR. BOMSE: Of course. The defendants
3 always are. Your Honor, I would hope that would be
4 acceptable.

5 MR. FURTH: Your Honor, may I speak
6 briefly to that point?

7 THE COURT: Yes.

8 MR. FURTHER: Their first wave of
9 discovery would limit us to interrogatories. Now, this
10 is a very simple program we have here as to the turning
11 over of documents. The discovery has occurred before.
12 It is not in evidence. We are just asking if we can
13 get the benefits of the 1812 and the other case discovery.
14 As to the request for documents, Your Honor, we ask
15 that they respond in 30 days. If they want to object,
16 if they want to sit down and have a meeting with us --
17 but this gets us into real discovery. Writing those
18 interrogatories, to which they file a list of objections,
19 puts us 90 days down the road. This is going to get
20 the substance of the information that we need, get the
21 grand jury documents. We made our request for documents.
22 When I filed my complaint in the Eng-Skell case --
23 one of the first ones filed -- I filed the request for
24 production of documents. They know what we are basically
25 going to file. They know what we are going to ask for.

1 If we go their way and start this first wave, we will
2 be on that boat forever. I don't understand that first
3 wave business. I, myself, feel we got good document
4 production, you get those documents, you study them,
5 you get organized, and then you take the depositions
6 down the line. We are not asking to take depositions.
7 All we want are these documents.

8 MR. KOHN: If Your Honor please, I
9 don't see why Mr. Bomse's vacation should in any way
10 make it impossible for the plaintiffs to file on or
11 before August 8th their Rule 33 and Rule 34 discovery
12 requests, which is what we ask for in (B). He then
13 has some five weeks after that, including two weeks
14 after the vacation period has ended, to indicate any
15 objection. As Mr. Furth has indicated, it is no secret
16 what our interrogatories are going to ask for. They
17 have had various interrogatories and various motions
18 for production of documents now for months or more. So
19 that I think this schedule is perfectly reasonable, and
20 while it occurs during the summer, it is we who have
21 to do most of the work during the summer, and I don't
22 think it is a legitimate objection from them.

23 MR. KIRKHAM: James Kirkham, Your Honor
24 and I represent the U and I Sugar up in the 1812 case.

25 THE COURT: Yes.

1 MR. KIRKHAM: If I may respectfully
2 suggest, we are perhaps mixing two subjects. One is
3 the question of what will happen to the documents pro-
4 duced by the defendants in the 1812 case, that are now
5 being scheduled for August 15 or the middle of August --
6 I haven't the date quite correct -- and I think that
7 can be a separate subject set aside. I don't really
8 feel strongly about that as long as, you know, defendants
9 aren't double teamed on this thing. And since we have
10 done that work, I don't feel strongly about that.

11 THE COURT: I take it that you agree
12 with me that it is desirable to have everybody brought
13 up to the same level as soon as reasonably possible.

14 MR. KIRKHAM: Surely. We all under-
15 stand that.

16 THE COURT: It is just a matter of the
17 time in which to do it.

18 MR. KIRKHAM: But let me point out
19 here, that we are talking about also in the proposal,
20 now, about some further discovery. Now, in the 1812
21 case there was a preliminary exchange -- and perhaps
22 counsel in their usual way were firing off the largest
23 volley they could pull together at the time, and at the
24 very strong urging of Mr. Ferguson in that case and
25 adopted by the Court, the discovery on both sides was

1 limited to first wave, so that what you would be bring-
2 ing people up to date on would be first wave discovery
3 in that case plus the documents we have provided for
4 first wave discovery in our proposed Section XVIII. As
5 far as first wave goes, that does accord with the manual,
6 and that is the way we did proceed in 1812.

7 Then a third point, if I may --

8 THE COURT: On this point I do not
9 propose to deviate from the manual. I think the manual
10 on first wave has stood the test of long application
11 and we have that experience now. I am not aware of
12 anyone who has come forth with any good reason why it
13 should not be followed.

14 MR. KIRKHAM: We attempted, as near
15 as possible to abstract precisely that language. I
16 believe that is correct.

17 MR. BOMSE: Yes, Your Honor. I have
18 Section 150 of the manual here. It tracks exactly
19 what is in our Paragraph XVIII.

20 MR. KIRKHAM: It is on Page 31 of the
21 defendants' proposal, Your Honor.

22 THE COURT: There is a difference in
23 the dates again, isn't there?

24 MR. KIRKHAM: Excuse me, 30. I
25 misspoke, Your Honor, 30 of the defendants --

1 MR. BOMSE: We could perhaps agree on
2 dates, but I think, provided that Your Honor should
3 order that first wave discovery as we have set it out
4 there is what is to take place, I think Your Honor has
5 already indicated that.

6 MR. FERGUSON: Your Honor, may I say
7 something?

8 THE COURT: Yes.

9 MR. FERGUSON: If we are to get on
10 with this litigation, I think it is essential that
11 everything that has been done, the answers to these
12 interrogatories in 1812, the documents that are going
13 to be produced for 1812, starting August 18, all of
14 these things ought to be available to all these
15 plaintiffs. And when they talk about following the
16 first wave of the manual and beginning all over again
17 what we began two years ago, it would be a tremendous
18 waste of time. And I suggest to Your Honor that if
19 that is what the defendants have in mind, that we don't
20 have a couple extra years to waste on this.

21 MR. BOMSE: Your Honor, I don't under-
22 stand that there is any dispute on that. And perhaps
23 Mr. Lang, who is in the case, can speak to that. But
24 that is what Mr. Ferguson conceded.

25 MR. KIRKHAM: I think we are sort of

1 passing in the night. Again, perhaps I did limit myself
2 to documents when I spoke previously, but answers to
3 interrogatories I would put in the same category. Those
4 are answered. They are on file, and we are not saying
5 that these plaintiffs should propound those identical
6 interrogatories again and we should wait and then
7 adopt those same answers 30 days later or something like
8 that. What I am addressing myself to is that in 1812
9 it involves the northwest market, involves issues that
10 are not involved in the indictments, at least in market
11 areas. And the discovery is more focused. There will
12 be other discovery, and to bring that up to date pre-
13 sumably, I assume there will be other discovery, and
14 it should be of the same kind, which will be first wave.
15 Now, that is my suggestion.

16 MR. FERGUSON: Mr. Kirkham has mentioned
17 limitations to the inter-mountain-northwest. That
18 is not the situation, Mr. Kirkham. The 1812 case
19 involves a California-Arizona area, and the Chicago-
20 west area to a very substantial extent. So, particularly
21 with regard to document production, I don't know how
22 many items we have gone over that involve documents in
23 those areas.

24 MR. KIRKHAM: My understanding is --
25 I do respect Mr. Ferguson indeed, and I will be guided

1 by what our actual document says, but my strong under-
2 standing is that there were some kinds of limitations.

3 But my point is, Your Honor, if I may say so,
4 if plaintiffs contend that that is a first wave of the
5 scope, fine, we can discuss, meet and perhaps come to
6 that agreement. I just doubt that that can be true.

7 THE COURT: Stay on your feet because
8 I want you to carry on. The only circumstance that
9 I know of in this situation that would suggest some
10 modification from first wave as defined in the manual
11 is the circumstance that three of the cases with us now
12 have gone forward with the discovery, at least in many
13 particulars, that could readily be assimilated, as it
14 were, by some or all of the other parties involved.

15 MR. KIRKHAM: I set that issue aside
16 from what we have already done. I don't feel that
17 strongly. I don't speak for defendants.

18 THE COURT: What I will ask you to do,
19 Mr. Ferguson, since you are the prime mover or at least
20 have carried forward on what has been done in 1812,
21 why don't you ask some of the defendants' people to
22 come back this afternoon after you have lunch and tell
23 them precisely what you propose. Don't you have it
24 in writing?

25 MR. FERGUSON: Yes, we have it right

1 here. We have a stipulation, an order.

2 THE COURT: Have you distributed it?

3 MR. FERGUSON: We can do that.

4 THE COURT: I am watching the time
5 because I want to stop at 1:30, if not before, and am
6 going to impose on you to continue through the noon hour
7 because you know I have to catch a plane this afternoon.
8 All right. I think, though, that it would not take
9 very long. You are all here. Everybody that wants to
10 be included can attend, and you can lay out to them
11 precisely what was done, give them the papers and at
12 least fill them in to that extent. Then they can
13 quickly decide in the near future whether or not they
14 can go along with your proposal.

15 MR. FERGUSON: I would suggest, then,
16 that one hour after we adjourn, all plaintiffs and
17 defendants who are interested should meet here, and
18 we will put on a little explanation of where we stand
19 in 1812.

20 THE COURT: Everybody should know
21 exactly what it was they did, where they are now and
22 everything else about it. We may get this behind us
23 today. You get your par diem for today, anyway, and
24 you might as well spend it on this case.

25 MR. GOLDBERG: Your Honor, may I be

1 heard with respect to one remark?

2 THE COURT: Yes.

3 MR. GOLDBERG: Your Honor said you know
4 of no reason to deviate from the manual other than the
5 1812 case.

6 THE COURT: That is what I thought.

7 MR. GOLDBERG: If Your Honor will look
8 at Paragraph (B) (1) of defendants' order, which is the
9 traditional starting way in these cases.

10 THE COURT: What page are you on?

11 MR. GOLDBERG: Page 30, Your Honor, of
12 the defendants' -- it is the names and locations
13 of witnesses, etc., for depositions to follow. In this
14 case, we have on other thing which obviates, perhaps,
15 the necessity for going in this slow, tedious manner.
16 That is the Bill of Particulars which the government
17 has filed. We already know the names of some of the
18 witnesses or many of the witnesses whose depositions
19 we will be seeking in this litigation. Paragraph 2, for
20 example, asks for the existence and location of custodian
21 of documents. We already know which documents we are
22 looking for to start with, at least, or many of those
23 documents. The grand jury documents. Really, in essence,
24 what defendants are really proposing here is to delay
25 the litigation for about three months while we do nothing

1 except do that which we are already going to do without
2 that, with one minor, from their point of view, minor,
3 perhaps, addition, and that is that they are going to
4 discover our transactions during this interim period.
5 At least from my point of view, I don't see how their
6 discovering the individual plaintiff's transactions
7 during this period is going to forward much. But on
8 behalf of my clients, I will be glad to produce that if
9 we can go to the merits of the litigation during this
10 period. I think that if Your Honor will look carefully,
11 what we have here is really a delay program. Nothing
12 will move forward which has not already occurred.

13 MR. FREEMAN: Your Honor, Mr. Goldberg
14 has well spoken to the first two points. I think the
15 first wave discovery has been modified in many cases.
16 And in this instance, there are two or three very strong
17 reasons for modifying it. But with respect to the
18 transaction portion of the first wave, I believe the
19 law has progressed, and the decisions have been made
20 in the last several years, which obviate the necessity
21 of plaintiffs answering transaction interrogatories
22 propounded by the defendants. So, for example, an
23 effort was made by General Motors, Ford and Chrysler
24 in the Fleet Discount case before Judge McGraw, and he
25 rejected their efforts to secure transaction data
purchases and sales, and instead he confined the discovery

1 to the liability issues. And now he has confined the
2 trial to the liability issues.

3 Judge Blumenfeld just did this in Hartford,
4 Connecticut, in a very important case where he decided
5 that the case was a very massive case, and that in order
6 to make the determination and signify to the management
7 that he would restrict the discovery to liability, now
8 he has decided that the trial would be on the liability
9 issue. There have been several instances of that kind,
10 which I believe will be collected by the staff that is
11 preparing materials for the editorial staff of the
12 manual to deal with that problem as it exists in massive,
13 multiple class litigation. In other words, I think
14 there is a trend developing that obviates the necessity
15 of transaction discovery at the outset until the
16 liability issue has been solidified. And I think in
17 this particular instance, our going forward with the
18 grand jury documents, our going forward and bringing
19 up to date on the 1812 situation carries the discovery
20 a long way, and we will come in at the next pre-trial
21 conference with a request for the taking of depositions.

22 MR. GOLD: May I be heard?

23 THE COURT: Of course.

24 MR. GOLD: My name is David Gold, and
25 I just want to call the Court's attention to the Snack

1 litigation in the Central District, which is very
2 similar to this litigation, except that they are involved
3 in wave discovery down there. I estimate it delayed
4 the case a year, and in this type of case, where you
5 are dealing with a simple product such as sugar, and
6 we know generally the type of documents we need, we
7 know the type of discovery we need, I think, I would
8 hopefully request, I do request the Court to reserve
9 judgment on wave discovery. Look at our interrogatories
10 and our document requests, and then let the defendants
11 come in, file whatever objections they have, if they
12 have any as to burdensomeness or anything else. But
13 to delay the case -- once you get into these waves,
14 Your Honor, you are always debating whether something
15 is in the first wave or out of the first wave, and we
16 had hearings after hearings about whether it's in
17 the wave or in the ocean, and you are going to get
18 involved in this thing for six months on waves. So I
19 respectfully request the Court to reserve judgment,
20 take a look at our stuff, and then make a ruling as to
21 what the defendants have to produce or not produce.
22 But there is no mystery in this case. There is no
23 mystery to the categories in this case. In fact, I
24 filed interrogatories and requests for production based
25 on the Snack Food litigation that would require the

1 production of materials here paralleling Snack Foods
2 that I think would satisfy a lot of the attorneys in
3 this case. And I respectfully request the Court to
4 reserve judgment on wave designation.

5 MR. FURTH: Your Honor, may I offer
6 a compromise.

7 THE COURT: Yes, but let Mr. Kirkham
8 speak, since he has been seeking recognition.

9 MR. KIRKHAM: Thank you, Your Honor.
10 I just would answer very briefly that the whole notion
11 of waves, discovery, first wave discovery, was, if I
12 understand the manual -- you understand it best of
13 us all -- was really to facilitate discovery and to
14 obviate the kind of situation where massive interrogatories
15 were filed, then objections and so forth, were made,
16 and I think it really is an efficient way to proceed.
17 We have got a lot of other cases to bring up to speed,
18 and the speed involved -- Mr. Ferguson and I,
19 certainly we were met with the objection in 1812 that
20 we were asking non first wave interrogatories. And
21 whatever you may define the area that we were -- areas
22 of information that we traded in 1812, it seems to me
23 that the sensible thing to do here is to bring everyone
24 up to speed, at least to that point, so we don't get
25 out of pace. And your suggestion, I thought was a very
practical one, that we should meet and Mr. Ferguson

1 I am sure will develop that. And it is really almost
2 a problem for the defendants. We don't want to be
3 double timed, but is always a problem on the plaintiffs
4 side to the extent which their particular plaintiffs
5 and areas feel that they are interested in, they have
6 some additional matters they want to ask in that same
7 level. That really is the common sense way to proceed.

8 THE COURT: Let me make one comment
9 about manual provisions brought to mind by Mr. Ferguson's
10 remark. The manual is considerably out of date. There
11 has not been a full revision of any consequence for some
12 time. I am quite confident the new developments
13 Mr. Freeman refers to will be among the matters to be
14 considered by the editors in August. We will have a
15 several day session in which we are going to totally
16 review the entire manual with a view of bringing it up
17 to date in judicial decisions, practices that have
18 been developed in various places, some of which have
19 proven successful in certain situations and so on. So
20 when I said we would follow the manual, I was particularly
21 aware of the exception; namely, if it appears that a
22 different procedure may be better in a given situation,
23 we will follow that. Of course, I can't make a ruling
24 about that now. At this time I am not sufficiently
25 informed. However, the proposed discovery order should

1 be presented very promptly, Mr. Bomse, today if
2 possible or very soon, to see if a reasonable solution
3 can be reached. We will let the gentlemen suggest a
4 solution because I cut you off there. However, I will
5 not rule on this until all of you have had a chance
6 to look it over and see where you can reach some agreed
7 modification that will be satisfactory.

8 If you can do that, that is the best way to
9 solve it. I want to be briefed on Article XVIII at the
10 earliest reasonable time you can agree on, and get out
11 a ruling on the memoranda, if possible within the next
12 30 days or something of that kind.

13 MR. BOMSE: That would be fine, Your
14 Honor.

15 THE COURT: That will give me a better
16 understanding of what the problem is and precisely what
17 your position about it is after you have had a chance
18 to spell it out. But in the meantime, while you have
19 it on your mind, tell us about your proposal.

20 MR. FURTH: Fred Furth, Your Honor,
21 from San Francisco. My suggestion is we put both pro-
22 visions in the order. Then that would permit the
23 defendants, if they want to go through a wave discovery,
24 they can go through this and ask these questions. If
25 we disagree, of course, we can object to it, and we can

1 do our thing, too, Your Honor. And then we wouldn't
2 have to wait six months before we even ask for our
3 documents.

4 MR. FREEMAN: I don't think that would
5 work.

6 THE COURT: Let's leave it for you
7 to get together this afternoon. Possibly you can
8 resolve it in a way that would be satisfactory, at
9 least for the time being, this first period.

10 MR. BOMSE: Mr. Freeman has already
11 whispered a schedule to me, and subject to taking it
12 up with the other counsel, I think it will work.

13 THE COURT: A briefing schedule is
14 fine, especially if you can agree on it.

15 MR. BOMSE: We hear you, Your Honor,
16 and we are going to try.

17 THE COURT: Fine, if you reach an
18 agreement put it into words, send it to me immediately,
19 and I feel sure I can approve what you have all agreed
20 to.

21 MR. KOHN: If Your Honor please, I
22 think there should be a cut off date which we have to
23 return to you either a compromise or a briefing schedule.

24 THE COURT: Thirty days.

25 MR. FURTH: Thirty days, fine, Your

1 Honor.

2 MR. BOMSE: Yes. We'll work on it.

3 THE COURT: Incidentally, gentlemen,
4 up to now this has been by far greatly ahead of any
5 comparable litigation that I have ever been involved
6 in. You are doing splendidly, and I want to be sure
7 to express my heartfelt appreciate for it in case the
8 marshall comes and takes me to the airport. It really
9 is very thrilling to me to be involved or even have
10 a small part in bringing about such expeditious action.
11 I am going to check with the office to see if they know
12 of any other litigation that will tie this. I will let
13 you know if I find they have.

14 MR. FERGUSON: Thank you, Your Honor,
15 for those kind words. We are on the language of the
16 protective order, Section XIX, of the plaintiffs'
17 proposed order. The difference is very small, but
18 the only thing, the reason for the difference is this:
19 the plaintiffs are concerned that they be able to use,
20 with a deponent, a document of another defendant, if
21 that occasion should arise. In other words, when we
22 are taking our depositions we want to be able to use
23 anything with a deponent that would refresh his recollec-
24 tion or would --

25 THE COURT: Why not?

1 MR. BOMSE: As I understand the point,
2 it simply -- everybody is agreed that there are matters,
3 for example, among the defendants who are competitors,
4 and in addition to being all in the same boat in terms'
5 of being defendants in this litigation, we are out in
6 the market competing against each other. And there may
7 be documents competitively sensitive.

8 THE COURT: The protective order can
9 cure that very effectively.

10 MR. BOMSE: That is all we are trying
11 to do here.

12 MR. FERGUSON: We feel it is too
13 restrictive. We are willing to go back to the drafting
14 boards with you, but we want one we can live with. We
15 want to be able to use a document the way a document
16 ought to be used.

17 MR. BOMSE: This sounds like a drafting
18 matter.

19 THE COURT: Mr. Staal?

20 MR. STAAL: Robert Staal for the United
21 States. I would like to be heard on this paragraph.

22 THE COURT: Yes, of course.

23 MR. STAAL: It seems to me, Your Honor,
24 we know we are the tail on this enormous dog. We feel
25 like we are about to get wagged. This protective order

1 would essentially foreclose the government in its
2 criminal prosecution from looking at whatever comes
3 out of it, and we could actually be in the position
4 where a deposition of one of our own witnesses could
5 be taken, as I understand this order, we would go into
6 trial without having seen what he told these people.
7 It seems to me that the law is that litigation of this
8 nature is to be done in open court, unless there is a
9 showing, a particularized showing that some privilege
10 such as trade secrets is made. And I would respectfully
11 suggest to the court that we stay away from a broad
12 order of this nature, and instead do it on an ad hoc
13 basis, if and when any real questions of privacy arise.

14 MR. KOHN: I would like to second
15 what Mr. Staal has just said, I think there has been
16 a somewhat loose attitude lately whereby plaintiffs
17 in an effort to get along have acquiesced in protective
18 orders for defendants, the sole purpose of which was to
19 prevent material from getting to the legitimate
20 governmental authorities. Litigation is supposed to
21 be conducted openly, and I think we have unduly restricted
22 ourselves. And in the course of that, we have made it
23 almost impossible to ask witnesses questions because of
24 loose language which has got into these orders. And
25 I do think that both of these problems which arise should

1 have the serious attention of the Court. And we should
2 begin to move the other way on these protective orders.

3 THE COURT: This brings to mind what
4 the ruling should be; namely, that everything in the
5 proposed order excepting these two matters that we
6 have spoken of, the one Mr. Staal has spoken of and
7 the other will be a subject of discussion this afternoon
8 to see if, while Mr. Staal is willing to serve pro forma
9 publico, we will have the benefit of his ideas and
10 suggestions on this. Would you be willing to assist us
11 in that way?

12 MR. STAAL: Yes, Your Honor.

13 THE COURT: Thank you very much.

14 MR. FURTH: Your Honor, there is one
15 other provision in this order, and that is in Section
16 (B) that relates to the related litigation, and it
17 lists all of the protective orders of related litigation
18 and supersedes this. Now, if we are going to get those
19 documents, then we ought to have those other orders'
20 lifted. We didn't know how Your Honor would want to
21 handle that in the 1812 case, but since Your Honor has
22 taken it now, and it is your case, I think Your Honor
23 would have the power to do that.

24 THE COURT: Well, I think I have the
25 authority to do that. Whether I should do it or not is

1 something else. My offhand thought about it is that
2 since we have already adopted a satisfactory protective
3 order in 1812, we should circulate that order to every-
4 body concerned to see whether or not they have any
5 objections or additions or whatever about it. If not,
6 we will adopt that one and vacate all others. If it
7 appears that there are some factors in 1812 that are not
8 agreeable to everyone, they can be heard and perhaps
9 determined in a conference call. It would seem to be such
10 a minor matter that it could readily be presented by
11 telephone and ruled on promptly.

12 MR. BOMSE: I think we can resolve this
13 one.

14 MR. BOYD: Your Honor, William Boyd
15 of San Francisco. Your Honor mentioned that, assuming
16 a satisfactory order could be agreed among counsel,
17 Your Honor would vacate all other orders. I refer to
18 the matters which are included in this proceeding. There
19 is in defendants' proposed list of plaintiffs' proposed
20 list of other related matters cases that are not before
21 Your Honor. I see Your Honor is not speaking to those
22 cases at this time.

23 THE COURT: I can't rule on any that
24 I don't have jurisdiction over, of course.

25 MR. FERGUSON: May I just say one thing
in that connection? There is a case, as we have told

1 you before, the case that was in Salt Lake City that
2 is now dismissed. There is still a protective order on
3 that case, and you offered at one time to talk to
4 Judge Hoffman about it. My feeling is that probably the
5 time has come.

6 THE COURT: If you let me pick the
7 judge down there to talk to, I will do it.

8 MR. FERGUSON: Well, the particular
9 judge in this case is from, I think, West Virginia.
10 You don't have the Utah problem. My feeling is that
11 we are going to want that protective order lifted in
12 the Salt Lake City matter because we have been hamstrung
13 by that for a long time.

14 THE COURT: Anyone object to that?

15 MR. KIRKHAM: Yes, Your Honor. That
16 may be the subject of perhaps discussion, and if we can't
17 resolve it, briefing. I can see Mr. Ferguson may have
18 some thought that there are some documents there, all
19 copies of which might be tried to be blanketed and
20 hidden away, on the one hand, and whatever he asks
21 for relevant in this case that we can't agree on, Your
22 Honor will tell us. What he is entitled to, he is
23 going to get. Then, in effect, what he is saying is
24 he wants that plus, just in case his fertile mind has
25 not encompassed enough, another group of documents which

1 demonstrably are not relevant within the framework that
2 he has asked for; in other words, just sort of like
3 saying all these documents we need and we wrestle around
4 with that and negotiate and resolve any problems with
5 Your Honor. And then he says, "Oh, and I want another
6 group." It is just to us to be burdensome and just
7 adds documents to the many that will already be there,
8 plus the problem that you have with protective orders
9 there and parties that were not before this Court now,
10 not even the defendants, but the plaintiffs. And they
11 ran both ways. Just creates a lot of problems which
12 I think, as a practical matter -- I naturally under-
13 stand Mr. Ferguson wanting to say "I want everything
14 I can possibly think of and then another group," but
15 I think he denigrates his own skill and ingenuity in
16 that regard. And I think we should just respond to what
17 we work out, and you finally tell us to be the scope
18 of proper discovery. And that includes whatever is
19 properly included anywhere else.

20 MR. OUTCAULT: R. P. Outcault for
21 Amalgamated Sugar. I just want to join. We are the
22 other defendant in the case in Salt Lake City. I just
23 want to join in Mr. Kirkham's objections. That case
24 Judge Hoffman retained jurisdiction of for any matters
25 that had to be later resolved. And it is not in these

1 cases and seems to me that no order should be made with
2 reference to it.

3 THE COURT: Mr. Greenan.

4 MR. GREENAN: Three points, Your
5 Honor. First of all, the judge in that case was
6 Judge Walter Hoffman from the District of Virginia,
7 sitting by designation in Utah. Secondly, the action
8 purported to be and was settled as a class action for
9 all industrial purchasers of sugar in the inter-mountain-
10 northwest, and thus, I think in response to Mr. Kirkham,
11 the relevance of documents in that action to this
12 litigation is apparent.

13 Thirdly, in addition to the documents which
14 were produced, and as much as our firm appreciates
15 Mr. Kirkham's compliments, it is possible that periodi-
16 cally we miss something, and we would like to find out
17 if we did. There were depositions taken in that case,
18 and those depositions, I believe, should be made
19 available to the parties here as part of this discovery.
20 There is no apparent reason, other than a protective
21 order entered, which I am sure with comity among judges
22 can be lifted, why those documents can be turned over
23 to the parties in this litigation.

24 THE COURT: I cannot decide this issue
25 on these presentations in which you are asserting opposing

1 positions. What I have in mind is that, first, I am
2 sure that Walter Hoffman would not deny me access to
3 documents, let alone even more important things, because
4 we have been very close friends for many years. But I
5 want to be sure to avoid the problems Mr. Kirkham has
6 spoken of and others as well and to see to it that it
7 does not happen. Now, it is possible, although not
8 probable, that you can discuss this subject and come
9 to some kind of an understanding for the time being.
10 The thing that comes to my mind is to ask Judge Hoffman
11 to send me, under seal, all of the documents that are
12 within the protective order so that I will have them
13 readily available, unless you gentlemen are so incon-
14 siderate as to require me to read all of them to
15 determine whether or not they should be released. I
16 won't be happy about it, but I will do it because it
17 is my duty.

18 I think this will make a possible solution,
19 but I am not ordering it. In the meantime, go ahead
20 and do the best you can for now. After all, not
21 getting those documents immediately is not a matter
22 of tremendous importance. Restraint for a reasonable
23 period is what we need. During that time, it is
24 possible you can come to an agreed solution for the
25 time being. If you can't agree, you will have to brief

1 me following the same procedure.

2 MR. BOMSE: We are doing it in the
3 same 30 day period we were talking about?

4 THE COURT: Right. I think that
5 covers it, at least it is the best I can do at this
6 time.

7 MR. BOMSE: All right, the next one,
8 Your Honor, is fairly short. It is Paragraph or
9 Section XXI entitled "Next Pre-Trial Conference" and
10 it appears on page 34 of the defendants' proposal and on
11 page 35 of the plaintiffs' proposal.

12 Now --

13 THE COURT: It has to do with a date
14 to be filled in?

15 MR. BOMSE: Right. Sentence one we
16 are all agreed on. All we need from Your Honor is a
17 date. But then the plaintiffs go on and they provide
18 two additional sentences we think are neither necessary
19 nor very advised. They say

20 "At this conference the parties
21 shall present to the Court its
22 views regarding a proposed trial
23 schedule."

24 And then they say

25 "To the extent possible, the

1 Court will conduct monthly
2 pre-trial conferences to
3 ensure steady progress of
4 this litigation."

5 As to the first, we think it is premature,
6 and as to the second, I am not sure that everybody here
7 ought to be gathered in San Francisco. It is not that
8 inconvenient for me, Your Honor. I just work five
9 minutes from here. But there are a lot of people, and
10 I don't think we need monthly conferences. I think
11 Your Honor has other things to do. Conferences can
12 be scheduled, if necessary, and as you indicated,
13 there is a telephone system which works reasonably
14 well when there are specific matters to be taken up.
15 We think that setting a date now for the next pre-trial
16 conference whenever is convenient, we would suggest
17 some time in the fall, and you consider at that time
18 such matters as should be before you. I am sure we will
19 have agendas. We will meet in advance, as we did this
20 time and try and agree on the various agenda items.

21 MR. FERGUSON: Your Honor, the reason
22 we have a blank date there for the next pre-trial
23 conference is that we believe, in order to keep this
24 litigation going, we should have a pre-trial conference
25 next month. And in the event there is nothing more to do

1 than a status report, you should have that status report
2 next month. The reason we believe a target date ought
3 to be set at the earliest possible date is so that we
4 would have some framework to work within. And we do
5 sincerely believe that monthly pre-trial conferences
6 in this litigation will be very helpful.

7 Now, there are going to be matters that if
8 people know there is going to be a pre-trial conference,
9 they can get prepared and bring up at the pre-trial
10 conferences that will be long delayed if there isn't
11 some schedule. So to the extent that your schedule
12 will permit, we would like to have a pre-trial conference
13 about -- since some of these things are to be resolved
14 within 30 days -- we would like to have a pre-trial
15 conference, I would say around mid-August, which would
16 give us another, say, five days after the 30 days. And
17 then we would like at that time to see what matters
18 we haven't been able to agree on. We would like to get
19 those matters resolved and get this show on the road.
20 And if Your Honor would consider giving us a trial date,
21 we would try to work within that trial date. I don't
22 mean any unreasonable trial date, a trial date far
23 enough in advance that it is practical. And I think
24 we would like to have Your Honor's thoughts on a
25 monthly pre-trial conference.

1 MR. BOMSE: I just have the feeling
2 that Mr. Ferguson's suggestion, which I am sure is offered
3 in good faith, is going to create all the needless paper-
4 work and all of the needless expenditure of time, not
5 to mention the small matter of money, to bring all
6 these lawyers out here, that Your Honor sought to avoid.
7 I think we should have conference as needed and retain
8 flexibility. Let's not lock ourselves into once a month.

9 MR. FURTH: Your Honor has spent so
10 much time and has handled more multi-district cases
11 than anybody. I think it would be a wonderful example
12 of efficient judicial administration, I really do, if
13 in a case like this -- Your Honor, whenever we do
14 things in life, if we set a schedule and say we are
15 going to have it by this date -- and I am thinking
16 about asking Your Honor, I am asking Your Honor to set
17 September of 1976 as the tentative trial date, so that
18 everyone would work in good faith to attempt to get
19 this case done by that time. Now, in everything in life,
20 if we set a goal and a standard, and if we could
21 convince more judges, Your Honor, to set a tentative
22 trial date where we are all supposed to work -- that
23 is a year and a half from now, maybe it won't come by
24 what Your Honor would want to say, well, I will review
25 this trial date again in April of '76. Gentlemen, this

1 is when I think we could get to trial in this case.
2 I have no doubt we can. This case has gone a long way.
3 Bill Ferguson has done a lot of work already in the
4 sugar area. The government has done a tremendous
5 amount of work in this area, and these particular
6 plaintiffs, if Your Honor will take a look at them, a
7 lot of them are large companies, not small companies,
8 large purchasers. I filed a case yesterday on behalf
9 of Mothers Cookies, three and a half, four million
10 dollar purchases of sugar. So I just request, ask
11 Your Honor to set a trial date in this case, just a
12 tentative trial date, and I suggest September of 1976.

13 THE COURT: Well, if I may be
14 facetious it strikes me that if we finish this litigation
15 too soon, I will promptly have another one on my hands,
16 possibly two. Seriously, I think a target date can be
17 very useful in setting dates for specific things along
18 the route. At this time, the first day on the track,
19 I think I can't do that. But I think I can by the next
20 time we have a conference because, first of all, we have
21 arranged for the doing of many things that already have
22 been done and agreed to here. Also, we are going to
23 have several others now outstanding, that will be resolved
24 sometime in the next 30 days or thereabouts. I will not
25 adopt a specific date at this time, but will set one

1 when we see how well we have done in the near future.

2 On the second point of the intervals between
3 pre-trial conferences, for this first coming period,
4 the chairmen of the steering committees, jointly, if
5 possible, shall make a written report stating progress.
6 If you are on target, you can simply say "We are on the
7 schedule that has been adopted." If at any time it
8 appears you are not going to meet the target dates,
9 then I want you to report to me about it right away,
10 so that I can be informed what you are doing, if anything,
11 to catch up to the schedule or set a net date that is
12 reasonable under the circumstances. Now, that is fair
13 enough, isn't it? If you agree that is the way we
14 will do it.

15 I am now conducting seven major litigations,
16 three of which are multi-district and the others in
17 my own district or in this one. I have been hoping to
18 work out a program under which I would hold full scale
19 pre-trial conferences within a ten day or two week
20 period in all of those litigations one after another.
21 That would give me time in between conferences to do all
22 of the many other judicial things in which I participate
23 and also to have more leisure time from now on. This
24 is what I hope to do commencing very soon. I am never
25 going to take any more than that number of cases and

1 I am not going to take any short or minor ones at all.

2 I think I can work this out in a way that will be
3 satisfactory to all of you, reasonably expeditious, and
4 in this case remarkably so. That is what I have in
5 mind. Of course, if something arises that seems to be
6 of sufficient importance, we can set up a telephone
7 conference call on it, or we can have a meeting with
8 representative counsel at Tacoma or some other
9 arrangement that will not require everyone all over the
10 country to attend. I leave this to the coordinator
11 for defendants and the chairman of the steering committee,
12 Mr. Ferguson. To put that program into effect, I think
13 the class action determination should be made as soon
14 as practicable. That will be the 20th of October.
15 That is the date for the last brief to be filed on
16 that subject, and if oral argument is granted it can
17 be made at the next pre-trial conference.

18 If I am not mistaken, that is approximately
19 three months hence and happens by chance to be about
20 the period between pre-trial conferences that I hoped
21 to establish. I would suggest that, among your
22 diversissements this afternoon and before evening, you
23 resolve this problem and come up with an agreed date
24 for the next pre-trial conference. If you can't,
25 Mr. Bomse and Mr. Ferguson can poll their colleagues,
and we will set the date in that way.

1 MR. FERGUSON: Right, Your Honor.

2 THE COURT: It looks as though we are
3 finished for the day. Is there anything else?

4 MR. BOMSE: Yes, Your Honor, two more
5 matters, although I don't think it will occupy very
6 much time. Paragraph XXII is another discovery para-
7 graph, and I would simply propose that that be the
8 subject of our discussion this afternoon, so it won't
9 occupy us at all. Paragraph XXIII is basically taken
10 out of the local rules here, and it simply provides
11 that if there is some problem with respect to discovery
12 such that there would have to be a motion made or
13 an objection filed, we can't get a hearing unless we
14 are prepared to tell Your Honor that we have first sat
15 down and had an informal conference with opposing counsel
16 and made an attempt to resolve our differences. I don't
17 know why anybody would object to that.

18 MR. FURTH: We don't object to that.

19 THE COURT: You don't object to that.

20 MR. BOMSE: Fine, Your Honor.

21 THE COURT: Thank you very much for
22 your remarkably cordial attitude and the remarkable
23 job you have done. You have reason to be proud to have
24 had a part in this, whatever the results may be, and
25 whatever the difficulties are, or temporary unpleasantness

1 may be. I am frankly thrilled to see such a remarkable
2 performance by so many very wonderful lawyers. If all
3 in our profession operated this way, we would have
4 a better public image. God Bless you.

5
6 (The Court was thereupon adjourned)
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C E R T I F I C A T E

I, ELINOR A. HOLLOWAY, Official Reporter
of the United States District Court at Tacoma,
Washington, do hereby certify:

That the foregoing transcript, Pages 1 through 101-A, inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such Official Reporter of the proceedings hereinbefore entitled and reduced to typewriting to the best of my ability.

Dated this _____ day of August, 1975.

ELINOR A. HOLLOWAY

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C O P Y

DEC 15 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUGAR ANTI-TRUST LITIGATION:

PRE-TRIAL CONFERENCE

December 9, 1973

Before the Honorable GEORGE H. BOLDT

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II.

1 A P P E A R A N C E S

2
3 FOR THE DEFENDANTS (CONTINUED):

4 ROBERT J. VIZAS
5 STEPHEN V. BOMER
6 FRANCIS R. KIRKHAM
7 JAMES F. KIRKHAM
8 PARKER A. MADDOX

III.

1 THE COURT: Good morning, everyone.

2 (Off the record)

3 THE COURT: I think perhaps it would
4 be appropriate to have the change in the coordinating counsel
5 personnel made of record. Would one of you gentlemen state
6 that situation for the record, please?

7 MR. RAVEN: Yes. Mr. James Kirkham,
8 on my left, and I, Robert Raven, will be coordinating counsel
9 for defendants at this time. To save problems in communicat-
10 ing with us, people can communicate directly with Jim, and
11 when Jim is on vacation I will pinch-hit for him.

12 MR. KIRKHAM: I may say that in my view
13 they can communicate with Bob. Either one of us will work.

14 THE COURT: Fine, thank you. I wish
15 to thank Mr. Bense for his service in that capacity. He was
16 most effective and most cooperative.

17 MR. RAVEN: We join in that, Your Honor.

18 THE COURT: His withdrawal from the
19 position does not suggest that he is disaffected in any way.

20 MR. RAVEN: He might even come back with
21 us, Your Honor. If he does, he can have his job back.

22 THE COURT: Are there any other prelimin-
23 ary matters that any one of you would like to bring up. I
24 see so many of you whom I know and have known for many years
25 on both sides of the house. I would like to come down and

1 greet you personally.

2 (Off the record)

3 THE COURT: Very well, the first
4 subject we will take up is the applications for class action.

5 MR. FERGUSON: Your Honor, I am
6 William F. Ferguson of Seattle, Washington. I am the
7 chairman of the Plaintiffs' National Steering Committee.
8 The argument this morning on the plaintiffs' motion to certify
9 classes for the plaintiffs will be Harold Kohn, who will
10 speak on behalf of the industrial, wholesaler and retailer
11 classes. It will followed by Mr. Lee Freeman, who will speak
12 on behalf of the governmental entities. He will be followed
13 by Paul Springer, who will also add something on behalf of
14 the governmental entities. We will finalized by Mr. John
15 Cochran, who is going to say a few words about an agricultural
16 sub-class.

17 Now, they understand the time restrictions that you
18 put on them, and hopefully we are going to be able to manage
19 within those time restrictions. I am sure everyone will
20 cooperate, Your Honor.

21 THE COURT: Thank you. Would you care
22 to speak now as to who will speak for the defendants, or do
23 you wish to defer that?

24 MR. RAVEN: No, Your Honor. I will
25 speak for the defendants, and maybe some others will have a

1 word or two. But I will attempt to argue the matter for the
2 defendants.

3 THE COURT: Very well. Mr. Kohn.

4 MR. KOHN: Your Honor, at the outset
5 I think we all owe you an apology for the tremendous volume
6 of paper we have dumped upon you. As I grow older I think
7 there should be some amendment to the United States Code
8 which requires any counsel who files a brief that is more
9 than 15 pages long or argues more than 15 minutes ought to
10 be hanged by his big toes for one day for each minute or
11 each page. I am going to be quite brief. I am going to
12 leave ample time for those who may need more time to persuade
13 you.

14 I think this is one of the most conventional class
15 situations so far as the executive committee and steering
16 committee classes are concerned. Perhaps the easiest way
17 is to refer -- I think you are always safer referring to your
18 opponents' brief. There is an excellent summary of the
19 classes which I espouse in Appendix A, Page 1 of the extended
20 brief filed on behalf of the defendants. And I have circled
21 here those which I appear on behalf of. And I will pass it
22 along to you in just a moment, sir. We really have simply
23 two classes, an industrial class and a retail grocers class,
24 the retail grocers having \$150,000 a year business or more
25 in each of three markets. There is no confusion. There is

1 no conflict among them. There is no claim that the grocer
2 who buys a product on which the industrial user has a claim
3 is making a second claim. Each is buying sugar, and each is
4 either selling the product, in the case of the industrial
5 user to whom the sugar goes, or in the case of the grocer,
6 re-selling the sugar as sugar.

7 Let me just pass that along to you. I have circled
8 those classes which I represent. Now, there are one or two
9 that I should comment on in addition. We in effect are also
10 representing the class of animal feed manufactures.
11 Mr. Cochran may want to say a word about it. The principles
12 there, it seems to me, are precisely the same as the
13 principles affecting our classes. At this time, nobody can
14 or should be concerned with whether ultimately there will
15 be recovery. The problem here is whether there are common
16 issues of fact and the classes are manageable. There is also
17 a class -- they are represented by Mr. Boone -- the wholesale
18 grocers. And I think once again whatever may be our feeling
19 with regard to the merits, whether they ultimately will or
20 won't recover, so far as the classes are concerned it is a
21 relatively small, defined class with common interests, easily
22 manageable, all known. And of course they can all get
23 noticed.

24 Now, the remainder on the subsequent pages are the
25 classes which Mr. Freeman and Mr. Springer will presumably

1 talk to you about. Next, if I can give you defendants'
2 summary, Appendix E, Page 1 -- and for the purpose of this
3 argument, I don't have to quarrel with their figures. You
4 will see you have once again relatively defined classes.
5 They have a precise number, some 91,000 entities in all of
6 these classes which the group that I represent espouses.

7 I think I can very briefly summarize the reasons why
8 these classes are, as I started out by saying, ultra-conven-
9 tional, almost like arguing that today is Tuesday. I think
10 it is Tuesday. I have been travelling so long. They are
11 people who have a common interest. There actually is a
12 defined group. The government even recognizes them as the
13 industrial users of sugar. They use some 72 per cent of
14 all the sugar that is produced. I think the members of the
15 industrial class use, in turn, some 93 per cent of that 72
16 per cent.

17 There are names recorded for everybody in that class
18 in the various trade associations to which they belong and
19 the various other groups of that kind. Many of them have
20 participated as, for example, in the State of California
21 Mr. Sevari's group in a recent litigation. Their names are
22 already on computers. The others can't be very easily put
23 on. Every one of them can be given personal, individual mail
24 notice with a minimum of expense. It won't cost \$15,000 to
25 notify the whole group of them.

1 In addition, there are recognized, established trade
2 publications in each of these groups through whom additional
3 public notice can be given. If Your Honor will refer to any
4 of the recent cases -- and I will call Your Honor's attention
5 to a very fine discussion recently by the Ninth Circuit, and
6 you will see that there really is no problem in connection
7 with this group. The case to which I refer is Blackie,
8 S-L-A-C-K-I-E, Blackie v. Barrack, which is reported, as far
9 as I now know, in the CCH Federal Security Law Reporter 1975
10 Cases, Paragraph 95,312. It is cited in our brief. It is
11 similar to the many very recent cases which we also cite in
12 the anti-trust field, cases decided by judges on both coasts.

13 There really is very little more that I think I should
14 point out except to state my bewilderment with regard to some
15 of the matters which are in the defendants' very lengthy brief.
16 There is attached thereto an affidavit by one of the repre-
17 sentatives of C & H, I think, which does not appear to have
18 been signed, which appears to state that some of the averments
19 in the affidavit are subject to verification by discovery.

20 And of course Your Honor will note the names of certain
21 of the defendants are not appended to the brief. I would also
22 point out that perhaps this characterizes the appended filing
23 on behalf of the defendants and their conclusions. Page 64
24 they have the rather odd sentence "We end where we began."
25 And I think that is precisely the thrust of the defendants'

1 argument. The entire some 60 pages leave you precisely
2 where you began in this case.

3 I said at the outset I don't think there is anything
4 more that I would want to tell Your Honor now. The moving
5 papers are extremely lengthy. I would like to reserve, since
6 I have been rather modest in my time consumption now, a few
7 minutes to indicate our attitude with regard to whatever
8 may be said somewhere along the line by other people who will
9 participate in this argument. If I could save five or ten
10 minutes for the end I would very much appreciate it. Naturally,
11 if there is anything Your Honor wants to ask me, I will be
12 happy to answer it. But I really don't see any point in
13 gilding the lily.

14 THE COURT: You may reserve whatever
15 time you feel appropriate.

16 MR. KOHN: Thank you.

17 THE COURT: Mr. Freeman.

18 MR. FREEMAN: I am Lee Freeman. I
19 represent the States of Illinois, Colorado, California, Oregon,
20 Washington, Kansas, Wisconsin, and Minnesota. I think that
21 is all of them, the public entity classes, the states who,
22 through their attorneys general, seek statewide public entity
23 classes and state public entity classes in the non-represented
24 states in the areas of the Chicago-west market and the inter-
25 mountain northwest market. Also with respect to most of

1 those states, consumer class actions have been requested
2 or amendments are being made to complaints to request them.

3 I note that Mr. Kohn seeks a rule of thought establish-
4 ing the size of briefs of 15 pages. In the Northern District
5 of Illinois, we have learned a long time ago and have
6 adopted a rule there that you get hung by your heels if you
7 file a brief in excess of 15 pages unless you have the
8 Court's permission.

9 I am not sanguine about the establishment of the
10 classes as Mr. Kohn is, and I do want to say something
11 specific about the classes we seek to establish. Mr. Springer
12 will deal with the statewide public entity classes and with
13 the non-represented state public entity classes. I will
14 deal with the manageability issues that have been raised
15 by the defendants and with the consumer class. And I hope
16 not to take very long in doing so.

17 The defendants have argued that the cases are not
18 manageable because individual proof is required for each
19 class member of the impact or question of injury of the
20 pass on issue and allocation of damages that is occasioned
21 by the pass on issue and other similar issues like the
22 fraudulent concealment issue which they regard as an
23 individual class member by class member requirement of proof.
24 They also argue that in the case of the consumer class there
25 is an absolutely horrendous problem of notice, administration,

1 distribution, which would involve tons of paper, millions of
2 dollars in costs, and actually, Your Honor, that whole argu-
3 ment is completely self-defeating as I will demonstrate. But
4 dealing with the impact or injury question as a separate issue
5 of proof, as an individual problem that faces each class
6 member, the authorities are overwhelming against that
7 position. And Judge Blumenfeld recently in the Master Keys
8 issue referred to that as the classic defense argument, which
9 he called a red herring.

10 Actually, in a price fixing conspiracy, the impact
11 question almost automatically flows when you have established
12 the price fixing conspiracy and one overt act, one sale.
13 Injury has then been established. From then on, it is a
14 damage question, and each individual member is required to
15 establish damages either individually or in the aggregate
16 as I will seek to demonstrate to Your Honor. Now, these
17 principles have been announced recently by Judge McGraw
18 (phonetic) in the Fleet Discount case, by Judge Blumenfeld
19 in Master Keys, cases which the defendants themselves heavily
20 rely upon. For instance, they cite the San Antonio Telephone
21 case, a decision by the Western District of Texas in 1973.
22 That case had to do with a monopoly, where the court recognized
23 that in a monopoly case the impact or the injury does not,
24 ipso facto follow. But the court went on to say that is
25 quite different. It is unlike a price fixing case. And we

1 are in a price fixing case here.

2 Also in another case they cite from the District
3 Court of Delaware, Barnett. The same distinction is made
4 in the very opinion that is so heavily relied upon by the
5 plaintiffs. But we don't need the defendants' authorities
6 to establish this principle that where you have this kind
7 of a conspiracy alleged involving the fixing or pricing or
8 the stabilization of prices or the prevention of prices
9 from being reduced because of competition, that ipso facto
10 injury follows.

11 We have cited in our brief expressions from the
12 United States Supreme Court which says a conspiracy, a price
13 fixing conspiracy when it is alleged or defined, defines its
14 victims, all of its victims. And we have cited a great
15 many cases, bringing it right down to the current time,
16 which sustain generalized proof of impact, this kind of
17 proof that I am now talking about of impact and injury as
18 sufficient to establish classes and also as sufficient to
19 carry forward with proof of liability.

20 As Your Honor knows, there are several cases now,
21 several important multi-district anti-trust proceedings
22 where the discovery and the trials have been bifurcated
23 between liability and damage issues. And the defendants
24 there, as they do here, argue that impact was a matter of
25 liability that had to be individually proven and they wanted

1 authority to proceed with elaborate discovery. The courts
2 have cut them short and found that the price fixing conspiracy
3 itself, if established by discovery, will establish the
4 liability question because any overt act is sufficient to
5 establish the injury issue for that purpose, although not
6 the damage issue which is a separate issue and is capable
7 of individual determination.

8 But now I come to the question that defendants raise
9 which has to do with what they call a pass on issue or the
10 allocation between classes. And this, I cannot overstress,
11 is the central core of the problem that faces the states
12 which I represent and is the central core of our presentation
13 to you, Your Honor. In this business, which is the sugar
14 business, we are dealing with a market that involves a
15 billion one hundred million dollars of sales per year. A
16 very vast amount of business in these three markets by these
17 sugar companies plus some that haven't been made defendants.
18 But largely by these sugar defendants.

19 Now, Mr. Kohn has very nicely segmented the class
20 between industrial users, wholesalers and grocers. The
21 industrial users use approximately 70 per cent. The whole-
22 salers and grocer purchase and sell to the consumers, whole-
23 salers to the retail grocers, and the retail grocers to the
24 consumers. Some 20 per cent of the total, 20 per cent of
25 one billion one hundred million dollars of sales ultimately

1 are sold on the grocery shelf to consumers.

2 Now, there is enough evidence in the record now
3 through affidavits and through some deposition testimony
4 that the defendants have taken to demonstrate that the
5 wholesalers, the non-industrial wholesalers specifically
6 have followed the practice almost uniformly of adding a
7 percentage to the price they pay for the sugar from the
8 refiners or the brokers and selling it in turn to the retail
9 grocers. The retail grocers, on the other hand, add an
10 amount, a dollar and cents amount to the price they pay to
11 the wholesalers or to the refiners that they purchase
12 directly, and then that price becomes the price the consumers
13 pay. So in each instance, the excess price allegedly
14 resulting from the conspiracy, from the price fixing con-
15 spiracy in each instance, the price that is charged the
16 retail grocer and the price that is charged by the retail
17 grocer to the consumer reflects the changes in prices or the
18 stabilization of prices fixed by the conspiratorial
19 defendants.

20 And what is contended here now is that the consumers
21 have no place in this litigation, that the funds should be
22 allocated between the industrial users, the wholesalers who
23 suffered no damage, the retail grocers who suffered no damage.
24 I am not contending against the class certifications. We
25 can have those class certifications and then, after liability

1 is determined, deal with the allocation question. And the
2 Ninth Circuit, in the Liquid Asphalt case specifically so
3 held. The language of the Ninth Circuit is that the allocation
4 among the middleman and the ultimate consumer, the
5 language of the court "Can be determined after liability has
6 been determined."

7 So that pass on question, rather than being an
8 individual question that has to be determined as a common
9 issue of liability, as the defendants contend, is a damage
10 issue that must be determined after the liability has been
11 established and can be determined by the court. And in this
12 particular instance, the consistency of the marketing process
13 is such that the consumer groups that we purport to represent
14 in each of the states involved feel that there will be
15 little difficulty establishing this pass on, if you want to
16 call it that, this pass through, as the defendants call it,
17 of the excess conspiratorially fixed price to the ultimate
18 consumer.

19 And incidentally, the Liquid Asphalt Ninth Circuit
20 decision also indicates that the question of pass on is
21 placed on the middleman to disestablish -- in other words,
22 the middleman, in order to recover damages must show that
23 he did not pass it on, that he absorbed some of the excess.

24 In any event, I will pass now to the consumer problems
25 that we present in our motions for certification. The States

1 of Illinois, Arizona, Colorado are three of the first that
2 have filed consumer classes. And we are confronted since
3 last year with the spectacle of the Eisen decision. But I
4 say to you as the Bureau of National Affairs in a report in
5 summary of Eisen, don't be misled by the headlines. Eisen
6 in our opinion supports, affirmatively supports, expressly
7 and specifically supports the establishment of consumer
8 classes. The Supreme Court in Eisen use this specific
9 sentence at the outset of its opinion "Economic reality
10 dictates that petitioner's suit proceed as a class action or
11 not at all."

12 This is the traditional language that the courts
13 have used when they have dealt with whether or not a class
14 action was a superior method of proceeding. And they have
15 said if you don't proceed this way, there is no relief left
16 for the individual consumer or the small claimant. Then
17 Eisen goes forward and is a very cautious and restricted
18 opinion that deals with three issues. What are the notice
19 requirements -- and in this instance the notice requirements
20 of Rule 23; second, who shall pay the cost of notice; and
21 thirdly, can the ~~state~~ court have a mini-hearing dealing
22 with the merits before certifying the class. The court
23 says no with respect to the mini-hearings, and that is a
24 very advantageous position for those plaintiffs who are
25 seeking to certify classes.

1 But what about the notice requirement? All that the
2 court did in Eisen was to find that there were 2,250,000
3 claimants, consumers, out of the six million that were in
4 the class; 2,250,000 claimants or consumers whose names
5 and addresses were inscribed on company computerized records.
6 All they had to do was press a button and those names and
7 addresses would appear that way. They were available. They
8 were readily available. They were there. And so the court
9 had the problem of discussing what Rule 23 required. And
10 Rule 23 says that individual mailed notice shall be made
11 where the identification of a class member is easily obtain-
12 able or reasonably obtainable. And so the court states
13 quite specifically that Rule 23 unmistakably requires
14 individual notice, and they direct it.

15 But they say nothing further about the other members
16 of the class, the three million odd, whose names and addresses
17 are not readily available but cite language from the
18 Mullani United States Supreme Court decision. And Mullani
19 in the language cited and other language in the case, says
20 specifically "We have frequently sanctioned public notice
21 where other methods are not as reasonably and readily
22 available as mailed notice." And the court does deal in
23 Mullani with the due process issue which Eisen did not deal
24 with except to cite the Mullani decision -- and finds that
25 such substitute notices like publication will satisfy

1 constitutional requirements.

2 We go further and we note in the Tetracycline
3 decision, Judge Wyatt's determination to have publication
4 notice for a consumer class there. The establishment of
5 the consumer class was severely criticized by the retailer-
6 wholesalers, and it did go up on appeal. They took it up
7 on appeal and disputed the certification of consumer classes,
8 disputed the type of notice, the publication notice. And
9 the Second Circuit sustained the certification of the class
10 under that opposition and sustained publication notice as
11 satisfying due process. The language is very clear, and
12 it is quoted in our brief on Page 17 in the reply brief.

13 So we are confronted now with the proposition that
14 Eisen requires, that there be individual mailed notice, but
15 only if the names and addresses of the consumer class members
16 may be obtained with reasonable facility.

17 Now, we have are dealing with a class of consumers
18 that we classify as household units. Sugar is purchased by
19 one or another member of a family, a household unit, and
20 our class is a household unit class. Arizona has so alleged
21 in its complaint, and Illinois and some of the other states
22 will modify the idea of residents to mean household units
23 that are actually purchasing sugar.

24 Now, the household unit is a classification where
25 names and addresses do not exist. The defendants have sought

1 to satisfy this matter of reasonably available identification
2 by suggesting that the class of consumers that are sought
3 in Illinois and other states really should be registered
4 voters because there is a large list of registered voters
5 with names and addresses presumably available. But the
6 difficulty is that the registered voters constitute maybe
7 two or three times as many names as there are household units
8 in each one of the states. And for that we have gone to
9 the US Bureau of the Census, which has that kind of a
10 category, household units, in each one of the states. And
11 we discover that to use registered voters or taxpayers,
12 which is another notion that they throw out, would involve
13 a list of names that far exceed the members of a class of
14 household units and the requirements of notice.

15 We submit to your Honor that in this particular
16 instance a notice by publication supplemented by a poster
17 notice in each of the grocers that are involved in these
18 states supplemented by an attached notice on a five pound
19 bag of sugar which we regard as the type of sugar that is
20 most frequently purchased, and also supplemented by messages
21 delivered by the attorneys general of each of these states
22 on radio and television advising the consumers of their
23 opportunity to opt out or have special counsel or be bound
24 by the judgment. And that is all the notice does. There is
25 a great over-emphasis played on the due process requirements

1 of this type of notice to consumers, individual notice. It
2 is overplayed because the possibility of an individual
3 consumer not receiving a notice and therefore being in a
4 position to institute an individual action on his own behalf
5 is so remote and economically non-feasible that his protec-
6 tion is not worth overwhelming the class action procedures
7 and managerial problems by providing for the individual
8 mailed notice.

9 And the defendants are not prejudiced because they,
10 too, must realistically face the fact that notices to members
11 of a class like consumers whose state is relatively small
12 will not offend their interest by causing those who are not
13 served adequately to be able to file a separate suit.

14 There is a case I have not included in our brief,
15 which was decided in 1969, that speaks just as I have spoken
16 about the overemphasis played on class notices to groups
17 of stockholders or consumers that are in the same category
18 as we are contending. It is Berland v. Mack, 48 Federal
19 Rule Decisions 121.

20 So much for the matter of notices. Let me also call
21 to your attention, Your Honor, that this attempt by the
22 defendants to secure a wider group of names and addresses
23 than is warranted under the definitions of the class that
24 we have made is an abuse that the Court of Appeals of
25 California has recognized in a case of Cartt v. Superior

1 Court, 30 Court of Appeals (3rd), 1960, decided in July, 1975.
2 And while I have the case completely discussed and quoted
3 from, I beheaded it somehow or other. Maybe it was part of
4 the story. But I didn't put the citation in my brief. It
5 fell out. So I hope you will cover it this way.

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7 (Continued on next page)
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1 In any event, in that particular
2 decision the Court of Appeals speaks of the necessities
3 of notice and interprets Eisen's requirements and makes an
4 important point of the fact that you don't take an arbitrary
5 list of names which may exceed the number of people that
6 are in the class or contains names other than the class
7 members and not really identified as class members and
8 make individual notice to them.

9 Let me go on then with the matter
10 of administration. I have spoken of notice under Eisen,
11 and I speak at some length because I do want to persuade
12 Your Honor, and I do think it is a crucial point. And I
13 do think that it has to do with whether or not you give
14 recognition to the consumer interest here who is the
15 recipient of the injury of the price fixing conspiracy for
16 twenty-eight percent of the total market. Twenty-eight
17 percent of the total market, 200, over 300 million dollars
18 a year of sugar was sold to the consumers in this market
19 who are, in part, thought to be represented by the seven
20 or eight states that are now involved.

21 This seems to be a horrendous kind
22 of injury which some of my associates would cancel out and
23 let windfall recoveries occur to the wholesalers and
24 retailer grocers. This, I think, must be presented. It is
25 an important consumer principle that we are advocating.

2 - 2 1 It is very clear-cut in this instance. It is so clean cut
2 that it is almost axiomatic that methods must be utilized,
3 procedures must be developed to give the consumers that
4 kind of recognition in this proceeding.

5 And so I deal-- and I will pass
6 over this rather quickly, the need to bifurcate the
7 liability and damage issues. It has been done in a half
8 a dozen cases recently, quite successfully.

9 THE COURT: I have been doing it
10 for a lot longer than that.

11 MR. FREEMAN: You started it, I
12 think, about fifteen years ago.

13 Also, so you have the liability
14 question to determine, and you know whether or not the
15 consumer has suffered an injury as a class and then go
16 on with the determination of damages. And in the case of
17 damages to the consumer, we advocate, as a step further
18 down the line, we advocate that the damages be determined
19 on an aggregated basis, Your Honor, because here we have
20 a peculiar industry that over-reports its activities, its
21 sales.

22 We have statistics of an official
23 character reported to the Government, published by the
24 Government, reported by the Defendants, maintained in a
25 great many details. It is maintained by states and by

2 - 3 1 character of purchaser. We can tell you how much sugar
2 was purchased by the retail grocers each year of the
3 time of the conspiracy, how much sugar was purchased by
4 the non-industrial wholesalers, or the wholesalers, each
5 year.

6 And in consequence, we can
7 determine how much sugar was purchased by the consumers.
8 Then the only problem becomes a multiplication problem,
9 after you have determined what the excess charges were
10 each year or each period of the conspiracy.

11 So this matter of aggregating
12 damages, here again, Your Honor, Eisen doesn't touch that
13 issue. In the lower Court, Eisen III, the Courts spoke
14 of fluid recovery very harshly. The Supreme Court, in a
15 very unusual move, vacated the Court of Appeals' decision.
16 Vacated it, erased it, made it for not, told Judge Medina,
17 as a matter of fact, that his opinion was irresponsible
18 and it should not be on the books. It cannot be used as
19 reference, even though the Defendants do.

20 But in any event, the Supreme Court
21 vacated the lower Court decision, which is unusual. They
22 dealt only with the notice issue without dealing with the
23 matter of aggregating damages, or as they call it, fluid
24 recovery, left that for further amplification and
25 application by the lower Courts, this Court, in this case.

2 - 4 1 We feel aggregating the damages to the consumer, allo-
2 cating it between the classes, becomes matters that are
3 not complicated.

4 And then we have a distribution
5 suggestion. The Defendants are very helpful to us and
6 advise us that the distribution of claims or of refunds
7 to the consumer class would cost us \$26.75 per claim, if
8 we follow the procedures in Technicraft-- well, as 125
9 million dollars as they figure the number of consumers
10 involved. We have suggested a far simpler distribution
11 procedure that may cost a few hundred thousand dollars,
12 and in this context, that is really very little. We have
13 suggested that there be a refund coupon, and the details
14 are not set forth in our brief, although we make the
15 suggestion in detail that there be a refund coupon
16 attached to each five pound bag of sugar and that it be
17 continued for two years, that it provide refund of ten
18 cents per coupon with a notice on it that the coupons be
19 accumulated so that after a certain number are accumulated
20 they can be turned in for refund.

21 Or as an alternative, which we
22 don't suggest, they could be turned into the grocer for
23 refund. We could even give the grocers a piece of the
24 refund for compensation for whatever administrative tasks
25 he would have to indulge in. And, finally, that the

2 - 5 1 refund coupon specifically allege that all funds that are
2 allocated to the consumer that are not utilized in this
3 claim procedure will be used by the state for a school
4 lunch program or something similar to that; which has
5 likewise been sustained in the Tetracycline case.

6 In closing, Your Honor, I would
7 sincerely call to your attention the Manual on Complex
8 Litigation in Section 143, which deals with the manage-
9 ment problems. The editors wisely say that, "Particularly
10 in consumer class actions where the potential or actual
11 class members may number in the millions . . .", that
12 didn't scare the editors, "The assertion of unmanage-
13 bility is typically pressed upon the courts. . .", and
14 the manual goes on to say it should not be countenanced
15 except in a very exceptional case.

16 Then, also, in dealing with the
17 allocation problem, which is another problem the
18 Defendants raise, in Section 146, the manual wisely points
19 out that there should be economic and other data made
20 available to the Court in order to make a proper allo-
21 cation between classes and urges upon the administering
22 judge that it should be noted that the interest most
23 likely to be adversely affected by the absence of reliable
24 economic data in a civil antitrust action is the consumer
25 interest, which it is the policy of the law to protect.

1 And the manual goes on, ". . . which it is the district
2 court's obligation to make certain that the consumer
3 interest is adequately protected."

4 Thank you very much, and Mr.
5 Sprenger will complete the argument.

6 THE COURT: Yes, Mr. Sprenger.

7 MR. SPRENGER: Paul Sprenger, Your
8 Honor, from Minneapolis. I am representing directly the
9 States of Wisconsin and Minnesota, as well as the other
10 seven states which Mr. Freeman referred to.

11 Mr. Freeman talked about our most
12 important area of consumer classes, which at the moment
13 there are only three. There will be more filed, I am
14 sure. I am going to talk briefly about the internal
15 state-wide classes of which we are asking nine be estab-
16 lished and the two regional classes that we are also
17 asking be established.

18 Basically, I can just run down
19 quickly in order to save the clock today, the four elements
20 of Rule 23 with respect to numerosity, of course, nine
21 internal classes range from a low in Arizona of 283 cities,
22 counties, to a high in California of 2,680; and that
23 certainly is numerous. With respect to the two regional
24 classes, we are asking that a Chicago - West class be
25 established over several states, which encompasses

1 approximately 10,000 cities, counties and states; an
2 Intermountain - Northwest class, Washington and Oregon
3 are asking to represent the other two states in that
4 market region. There are approximately 1200 cities and
5 counties as well as two states.

6 With respect to commonality and
7 typicality, I think I can deal briefly with those
8 together. The thrust of the matter is, of course, the
9 common, single conspiracy which is handled well in the
10 brief of, both the Governmental brief and the private
11 party brief. The Defendants own affidavits, I think,
12 assist in great detail in their main brief, attached to
13 their main brief. They state that the states that they
14 have deposed, and I think they have deposed California,
15 Minnesota and Illinois, their class action discovery, so-
16 called.

17 They state that we buy through
18 public bid. I think that really defeats the other part
19 of their arguments where they are trying to say how
20 diverse the purchase process is with respect to the
21 Governmental entities. It is pretty uniform, and these
22 purchases, again from the depositions, show that we are
23 generally purchasing through wholesalers, as Mr. Freeman
24 was talking about in the consumer area.

25 The other point, the fourth matter

2 - 8 1 in the Rule, is fair and adequate representation. I think
2 it is well established, and this Court is well aware,
3 that the attorneys general of those nine states are
4 qualified and appropriate representatives. Private
5 counsel have filed their affidavits and I believe they
6 will show the qualifications. I think it is important
7 to note the best the defendants can do in their main
8 brief is to try to mesh us in; that is, our three kinds
9 of Governmental entity classes we are trying to establish--
10 they try to mesh us in with the other industry user
11 classes and the questions in those classes. And they
12 don't deal at all in response to the cases that we cite
13 establishing the internal state-wide, city county
14 government classes, or the regional classes, which are
15 established by the many cases which have been pursued
16 by Mr. Freeman and Mr. Ferguson and some others here.
17 Therefore, I really personally
18 don't see that there is any difficulty with the two
19 classes that I am talking about, the internal classes,
20 the regional classes. Now, with Mr. Freeman's most
21 important area of the consumer classes, with respect to
22 the internal and regional classes, the notice lists--
23 the addresses are available in the census records and
24 have been in many other cases, they have been used. The
25 costs, manageability aspects are just no problem to

2 - 9 1 those attorneys general, none of which are here today
2 asking that the motion for the internal and regional
3 classes be granted.

4 Thank you.

5 THE COURT: Mr. Cochran, I believe.

6 MR. COCHRAN: Judge Boldt, brevity
7 is a virtue in a lawyer. I hope to be virtuous.
8 Pursuing the Court's remarks in the Labhee case, I think
9 we need all of the criteria in the checklist that the
10 Court set down in that case in the Court's remarks as
11 to the necessity of meeting these criteria in order to
12 plead a class.

13 I am counsel of record in Seeco,
14 75113, and in Ewald Brothers Dairy, 75145. I am a
15 member of the steering committee in the sugar litigation.

16 I commend to the Court the formation
17 of a class at this juncture of the agricultural users of
18 sugar: mixers, millers, compounders of animal feeds in
19 the various three markets we are here concerned with.
20 They are easily identifiable; they are, in fact, already
21 identified on computer and computer printout on file in
22 the United States District Court in the District of
23 Minnesota. I had the pleasure of leading the class in
24 the Doughboy case where we distributed some forty-four
25 million dollars to the mixers, millers and compounders

2 - 10 1 and retailers of animal feeds in the United States. It
2 is a homogeneous class, they purchase very large
3 quantities of blackstrap molasses, sugars that are put
4 in the feeds. They get approximately twenty percent of
5 the blackstrap molasses that is produced in the United
6 States.

7 I think that it would move this
8 litigation along if at an early juncture the Court forms
9 this class of agricultural users; and I would commend
10 to the Court, and I in fact represent to the Court that
11 I think it will advance this litigation, and there is,
12 as I understand, no objection on behalf of any of the
13 other plaintiffs to the formation of this class. Thank
14 you.

15 THE COURT: You are welcome. I
16 believe that concludes the presentation for the plaintiffs.

17 MR. FERGUSON: That is correct,
18 Your Honor, although there was a request for rebuttal time.

19 THE COURT: Yes, of course. There
20 is about twenty minutes of your hour left, and you may
21 use any part of that you wish to reply; and anyone you
22 select to do the replying may do it.

23 MR. FERGUSON: All right, Your Honor.

24 THE COURT: Now, would you like to
25 have a short break at this time, or shall we go ahead?

2 - 11 1 I dislike to break up your argument. I am quite prepared
2 to carry through.

3 MR. RAVEN: Whatever Your Honor
4 wishes. My colleagues suggested a short break.

5 THE COURT: Do you consider ten
6 minutes adequate for your purposes?

7 MR. RAVEN: That would be fine.
8 May I ask a question, Your Honor, before we break?

9 THE COURT: Yes.

10 MR. RAVEN: I got the impression
11 Mr. Kohn might want to respond to part of what Mr.
12 Freeman said. Maybe I was wrong. If we were going to
13 respond to that, I would just as soon hear that first.

14 MR. KOHN: You may save me the
15 trouble.

16 THE COURT: We will resume at
17 ten minutes after eleven.

18 (Whereupon a ten minute recess
19 was had.)

20 THE COURT: Please be seated.

21 (Off the record discussion.)

22 MR. RAVEN: Robert Raven for Anster.
23 I will make the argument on the class request for the
24 defendants.

25 Your Honor, we feel that many of

1 the criteria of Rule 23 have not been met. First, I
2 would like to go through and give you an overview of
3 our argument and then go into specifics.

4 THE COURT: Yes.

5 MR. RAVEN: First-- and this is
6 a threshold question-- plaintiffs have not even chosen
7 a representative party or parties for their various
8 classes. What they have done is just dumped in everyone
9 that has filed a complaint in this Court. For example,
10 if you take their so-called industrial class in California
11 and Arizona, you will find, I believe, if my count is
12 right, about thirteen different complaints that have just
13 been put forward as representatives. Four of them are
14 from different districts; some are from the Northern
15 District of California, some Central, some from the
16 Southern District, one from Minnesota.

17 And it is that point, when I get
18 through with the overview, that I will be turning first--
19 we say that what we have done here, we have created a
20 smorgasbord of cases in different districts which will
21 inevitably lead to overlapping classes, if you were to
22 go along with their suggestion, which would result in
23 inconsistent adjudications, once these cases go back to
24 their various districts, and excessive number of attorneys
25 involved over what there would ordinarily have to be.

2 We also say that joinder is not
3 impractical here. We have many examples of it, like Mr.
4 Ferguson's 1912 case and others that I will refer to.
5 There are no common questions. The allegations of the
6 Government, which the plaintiffs have adopted, show no
7 common conspiracy. If you take them at face value, even
8 the three charged by the Government, considered most
9 broadly, have different sets of defendants, co-conspirators,
10 in different markets. But even if you conceded for the
11 purpose of argument a common conspiracy, proof of impact
12 shows that the questions, the individual questions, would
13 predominate.

14 The plaintiffs' claims are not
15 typical of each other, to say nothing of not being
16 typical of those they represent. There are different
17 products involved, different sellers, different areas,
18 different terms, different levels of distribution,
19 different times of purchase, differences re. availability
20 of allowances, prepaids and other elements of price.

21 Shall we say that even assuming,
22 for purposes of argument, the charge of alleged conspiracy
23 in each of these three market areas which have been
24 designated by the Government, the plaintiffs say that
25 all defendants participated in those, they are going to
have to prove the participation of all defendants. We

2 - 14 1 have to prove how it impacted each plaintiff and each
2 class member; and because of the way the Government and
3 they have adopted these pleadings, characterized price
4 and availability, freight terms and allowances, indirect
5 purchasers, different terms of purchasers, negotiations,
6 the questions of pass-on, contract, price protection,
7 shows that there is going to be individual questions for
8 each one of those purchasers.

9 Finally, the class action is
10 not superior in this case, and we have good evidence in
11 this case of that. I think we sometimes forget a point
12 that Max Blecher made in 1972 to the Ninth Circuit
13 Judicial Conference, that after the amendment to Rule 23,
14 1966, Multidistrict Act came along, and that has taken
15 the place of much of what Rule 23 was intended to do.
16 And that is why we find, in this case, we find Mr. Ferguson
17 with his 1812 case with a number of plaintiffs, but not
18 a class action, with his Northwest Candy case. We have
19 Mr. Blecher with his Continental Baking case, and with
20 the Pearson case. We have Mr. Dwyer, who just a few days
21 ago filed for American Bakeries, not a class action. We
22 have Washington Beverage, filed by Mr. Malanca in Tacoma.
23 We have Benner Tea with a total of eight individual
24 plaintiffs filed by Mr. Hotsper (phonetic).

25 This shows that sugar purchases

2 - 15 1 ranging from size from local bottlers and local candy
2 companies to large baking companies can file class
3 actions; and under this multidistrict procedure with its
4 streamlined procedures, ably prosecute their actions.
5 And as the advisor committee itself noted, even in cases
6 involving common questions, as these do not, we claim,
7 the class action is not always appropriate. In fact,
8 even when common questions predominate, it is not
9 appropriate if there are other manners of handling the
10 litigation which will handle it much better.

11 Now, turning then to the first
12 point after that overview and going back to this question
13 of multiple class representatives, there are some good
14 cases that lay this all out that we have cited. One,
15 Career Academy litigation, which we have cited in our
16 brief; and that case, number of cases, four cases, have
17 been put together by the panel, and the four single
18 plaintiff cases all agreed or asked that they be design-
19 nated the class representative of a single class of
20 Career Academy franchisees and executors. The Court
21 denied that representation with the following comment:

22 "The main purpose of consolidating multidistrict
23 cases in one court is to conserve judicial
24 resources and avoid duplication of effort in
25 several similar actions."

Another salutary purpose, and one

2 - 16 1 specifically mentioned by the panel in this matter, is
2 to avoid inconsistent adjudications with respect to
3 class action claims. As we know, transferee cases
4 retain their individual identity and are to be returned
5 to the place where they were filed. Thus, the avoidance
6 of inconsistent adjudication with respect to class
7 actions must necessarily involve choosing among
8 competing representatives or structuring complimentary
9 classes so as to avoid overlap as much as possible.
10 And the Court said, "Return of the cases in this pro-
11 ceeding with the class determinations sought herein
12 would result in four separate class actions." That
13 would not only be merely overlapping, but they would be
14 absolutely identical.

15 And this is one, precisely one of
16 the difficulties of consolidation is designed to avoid.
17 And the judge in that case was speaking directly to the
18 point we have here in these classes where they have a
19 whole host of people asking to be the representative of
20 one class, and many of them, for example, like this
21 industrial plant in California, Arizona area are from
22 four different courts. And how would they handle that
23 if their request were granted and it came time to
24 remand those cases to Minnesota and the other places?
25 Who would be the class representative?

2 - 17 1 The transit company case, the
2 tire case that we have cited in our memo, also speaks
3 to that. There there were only three sets of plaintiffs,
4 or three separate actions, which were put together under
5 one judge, and there all three of them sought to repre-
6 sent the same class, pursuant to agreement of liaison
7 counsel. The Court held the agreement inoperative,
8 recognizing the problems which would arise from remand
9 and from having excessive numbers of attorneys involved
10 in that matter. This is what the Court said:
11 "There has been no designation as to which of
12 the three separate civil actions plaintiff
13 desires to proceed with as class action cases.
14 There has been no motion by any of the
15 plaintiffs to dismiss their individual actions
16 without prejudice or join as a party plaintiff
17 in and other action brought as a class action,
18 and none of the party plaintiffs has advised
19 the Court why it is necessary to have three
20 representative plaintiffs in any one of these
21 three class actions or why it is necessary to
22 have numerous attorneys from at least five
23 different law firms as counsel for the repre-
24 sentatives of the proposed class of plaintiffs."
25
Now, let's see what has been done
here. In the industrial class we find that a total of
81 representative parties from 30 cases which have been
filed in six different judicial districts asked to be
the representative of this one class. Now, that is
since Friday, because when we got the plaintiffs' reply
memo it contains, way in the back, a document, supplemental

2 - 18 1 listing of class representatives. And it has apparently
2 picked up all of the other cases that have been filed.
3 I don't know if anyone knows anything about those people
4 or not. They are being advanced as class representatives.
5 We haven't even been served with complaints with respect
6 to some of these purported class representatives.

7 In those thirty cases, you have
8 a total of 23 law firms representing those 31 purported
9 class representatives, compounding the problem of
10 excessive attorney involvement. You have these various
11 cases following discovery upon remand to six different
12 judicial districts for trial. It raised all the problems
13 of inconsistent adjudication that this multidistrict
14 litigation was supposed to solve and also what Rule 23
15 was supposed to solve.

16 Now, plaintiffs division on a
17 free market basis doesn't even go a small step in
18 resolving this problem. For example, in the California -
19 Arizona class, there are a total of 50 representatives
20 from 13 cases filed in 4 judicial districts represented
21 by 13 different law firms, each seeking to represent
22 the same class. That was added to by two with this new
23 filing. And it is the same problem in the other so-called
24 industrial classes. For example, there are 27 actions,
25 but I don't know how many plaintiffs, because there is

2 - 19 1 a number of plaintiffs in some of those actions-- 27
2 actions to have been advanced as class representatives
3 for that one class.

4 So we point here that the problem
5 of Transit Tire, as the judge saw it in that case, are
6 compounded by the fact that now we have 44 classes to
7 which plaintiffs seek to represent classes of industrial
8 purchasers, 11 different combinations of defendants sued,
9 11 different combinations in those suits. You have also
10 the fact that many of the putative class representatives
11 have never done business directly with some or all of
12 the defendants. The fact that not all of the defendants
13 even do business in the market in which the plaintiffs
14 allege that defendants conspired; the fact that in some
15 of the cases certain of the named plaintiffs do not
16 even do business in the market in which they seek to
17 represent others, for example, Food Mart, Owen Enter-
18 prises. The retail grocer, so-called retail grocer
19 classes are the same. The plaintiffs propose a total
20 of 23 class representatives in 4 different cases filed
21 in 2 districts to represent that class. They have a
22 total of 4 law firms representing those 23 class repre-
23 sentatives.

24 And here there are four different
25 combinations of defendants sued, compounding the problems

2 - 20 1 which would arise with respect to inconsistent adjudication. The wholesaler grocers is much the same.
2
3 Originally there was only one case with one plaintiff,
4 and that is United Associated Grocers, purporting to
5 be a class representative for the wholesale grocers in
6 two markets, Chicago - West and California - Arizona.
7 That in itself presented a problem of standing because
8 the main plaintiff in that action apparently does
9 business, according to its complaint, only in Nebraska
10 and Iowa, both in the Chicago - West market. Yet it
11 purports to ask you to be allowed to represent the
12 wholesale grocers in this California - Arizona market
13 as well.
14
15 Last Friday, December 5th, this
16 problem was compounded when CFS Continental of Los
17 Angeles filed an amended complaint and class motion in
18 which 20 new named plaintiffs are to be joint representatives with United Associated Grocers. Of all the
19 wholesalers, they claim in Chicago - West, California -
20 Arizona, and Intermountain - Northwest, in other words,
21 they have now reached out to the Intermountain - Northwest.
22
23 So this brings it to a total of
24 21 plaintiffs in two different actions seeking to
25 represent one class. The same situation pertains to
the Government classes; Illinois, Minnesota and Kansas,

2 - 21 1 although it is a little unclear where Kansas is from
2 the record on that. But they all apparently seek to
3 jointly represent a class of all of the representative
4 states in the Chicago - West territory, and there are
5 thousands of respective political subdivisions. So
6 there we have three plaintiffs from three cases filed
7 in three different judicial districts represented by
8 four law firms seeking to represent those same classes.
9
10 And the State of Washington and
11 Oregon jointly seek to represent all unrepresented
12 states and subdivisions in the Intermountain states,
13 and there you have two plaintiffs and two cases filed
14 in two different judicial districts seeking to make
15 this representations.
16
17 So we say the problem that is
18 pointed out in Career Academy and Transit Time are not
19 only present in this case but they are multiplied many
20 times over. And to allow these cases to proceed as
21 class actions along the lines as proposed by plaintiffs
22 would violate the objectives of 1407, the objective of
23 Rule 23 and due processes brought without regard to the
24 substantive requirements of Rule 23 because it would
25 allow for ultimate inconsistency in adjudications
regarding identical classes and would result in the
involvement of an inordinate number of attorneys involved

2 - 22 1 in this action where it is not necessary. And the more
2 attorneys get involved, Your Honor knows, the longer it
3 takes usually.

4 The reason we started out by
5 bringing this problem up at the very outset, I think
6 it is symptomatic of the plaintiffs' whole approach to
7 this. It shows that they would not even do the work
8 for Your Honor of trying to sort this out, but just kind
9 of brought it in the wheelbarrow basket, just dumped it
10 in the heap here. And as new complaints are thrown
11 in, those peoples' names are automatically added to one
12 who is going to represent the class. That is the amount
13 of attention that has apparently been paid to this
14 request they are making of you as to having these people
15 picked out as representative of the class.

16 I would turn now to the problems
17 that are associated with the requirements of Rule 23 A and
18 B(3). And our first point is that there is not the
19 commonality or typicality that is required for class
20 certification. We started out with the proposition that
21 not every antitrust case is appropriate for class treat-
22 ment. This was recognized by the advisory committee on
23 the rule, as Your Honor knows. As you will recall, they
24 said, "Private damage claims by numerous individuals
25 arising out of concerted antitrust violations may or may

2 - 23 1 not involve predominating common questions." And this
2 was in fact recognized by this Court, I believe, when
3 at the hearing on September 26th you pointed out the
4 only question concerning it-- by "it", you were
5 referring to the question of the class determination--
6 is the fact pattern in the particular case. That is the
7 only thing that anyone could think of that is new to
8 talk about on this particular subject, at least. So that
9 is what I want to hear."

10 I think you were quite right. You
11 wanted to hear what is the fact pattern in this case.
12 And I submit to you these plaintiffs have come here and
13 made no record whatsoever, no record whatsoever. In
14 that respect, Your Honor, may I do something that I was
15 going to do at the outset and forgot, and that is, may
16 it be agreed that the depositions that were taken in
17 the class action discovery are in the record before the
18 Court now. Some of those haven't been filed. We will
19 get them filed as soon as we can. Your Honor knows the
20 time has been short. We will get those on file. We have
21 cited from them.

22 May it be also understood that
23 the answers to the interrogatories-- the interrogatories
24 are in the record for the purpose of this class deter-
25 mination.

2 - 24

1 And, finally, I would like to
2 suggest this if I might, Your Honor. As you recall,
3 Mr. Kohn, on behalf of the other plaintiffs, at the
4 outset of the discussions on whether or not there would
5 be class discovery, class determination discovery, said
6 that they were willing to agree and stipulate, and
7 they did stipulate that all they knew about the basis
8 of these actions that they filed here was what was in
9 the Government complaints and in the bill of particulars.
10 And we have all referred to those. We have somewhat,
11 the plaintiffs have too, and it seemed to me it is not
12 really fair to the Court not to have them before you.
13 And with the Court's permission and the consent of the
14 defendants I will have prepared a set of the two indict-
15 ments, the three civil actions the Government filed and
16 the bills of particulars and lodge them with the Court
17 in the record of this case.

18 And so, I ask that it be understood
19 that those three matters, the interrogatories to the
20 answers, the depositions and the Government documents
21 I have referred to will be a part of the record for this
22 determination.

23 THE COURT: I would want to get
24 the view of the plaintiffs.

25 MR. KOHN: It is entirely agreeable

2 - 25 1

to us, sir.

2 THE COURT: So ordered.

3 MR. RAVEN: Thank you.

4 Taking off from Your Honor's order
5 that we should discuss the fact pattern here, that is
6 what we want to do. What is this antitrust model that
7 Professor Moore and others have referred to as the model
8 which allows class treatment? And they have said that
9 it is a common conspiracy with common impact. And
10 Professor Moore stated it this way:

11 "The convenience and efficiency of a class
12 action are often demonstrated in a suit
13 brought in behalf of a large group claiming
14 to have been injured by defendant's activity
15 in restraint of trade. Where liability
16 depends on legal and factual issues uniformly
17 relevant to all of those allegedly harmed,
18 if liability is found, the individual claims
19 for damages can then be determined in a sub-
20 sequent proceeding."

21 Then he points out:

22 "The propriety of class treatment becomes more
23 doubtful, however, where the situation departs
24 from that antitrust model."

25 He says:

26 "Where the product or the purchasers are not
27 standardized so that the defendant or some
28 individual defendants may not have acted
29 uniformly with respect to all class members,
30 the basic question of market definition, con-
31 spiracy or restraint may not be the same for
32 all class members, characterization of some
33 issues of legal responsibility is common, and
34 identification of a class, all of whom were

1 affected by the challenged practices, could
2 lead a judge to a predetermination of the
3 merits of the case. In addition, in some
4 cases, individual defenses may decimate the
5 class of those ultimately entitled to
6 recover, although generally illegality of
7 defendant's actions may have been established.
8 Such a result would indicate that those
9 individual defenses and claims were
10 realistically predominant over the general
11 combinations."

12 And that is our point here,
13 Your Honor, that this does not fit the antitrust model
14 that has been used for class certifications. Quite
15 to the contrary, it fits that type of antitrust action
16 which the courts have uniformly refused to certify
17 because it presents predominant individual questions
18 of law and fact. It presents, along with that, mana-
19 geability problems. This was recognized, this point,
20 in the Transit Tire case in which the court refused
21 to certify a class of only 750 public transit tire
22 companies because of the disparate selling practices
23 of the defendants and the nature of the alleged
24 conspiracy.

25 I think that case is very closely
on all fours with our case. The court pointed out that:

"The instant litigation did not fit the anti-
trust model where all legal and factual issues
relating to liability are uniformly related to
all of those allegedly harmed."

He said:

1 "In this litigation, neither the product
2 involved nor the purchasers are standardized.
3 Rather the class includes different sizes of
4 transit companies operating under different
5 conditions throughout the United States, and
6 the products involved, although commonly
7 referred to as special mileage commercial
8 tires, differ in many respects, and have been
9 marketed under various arrangements which
10 were reached by different methods at different
11 times."

And then he points out:

"Because of the numerous differences which may
arise in the dealings between the class
members and the defendants, there are not
common questions, that the individual questions
predominate."

And I won't go through the whole
discussion on that, but just let me close with what he
has to say about this very quickly seized upon argument
by plaintiffs that it is a conspiracy, and therefore,
just as simple as that, a common question. This is what
the judge in the transit case had to say about that:

"Plaintiffs argue that the common questions
of law and fact herein are the questions going
to the alleged conspiracy to restrain trade,
lessen competition and attempt to monopolize,
ignore the proper determination which must be
made on a request to maintain a class 23(b)(3)
class action. Rule 23 requires more than a
consideration of commonality in the ultimate
question of law or fact. It requires close
consideration of the separate questions of law
or fact which determine the ultimate issues."

Due to the fact that plaintiffs
claim only damage on behalf of the class, and there is

2 - 28 1 no request for injunctive or declaratory relief, the
2 gravamen of this litigation is whether or not the
3 plaintiffs and class members were injured by any action
4 of the defendants. Whether injury is viewed as an
5 element of proof of liability or as a separate issue,
6 the fact remains that proof relating to injury and
7 proof in defense of the claims of injury will involve
8 individual questions of fact.

9 We think that is our case. Even
10 before we go to the differences in selling and buying
11 practices, which we say result in different questions
12 on proof of impact, we think we can illustrate how this
13 case fails to meet the antitrust model because of the
14 nature of the Government case upon which these plaintiffs
15 rely.

16 Your Honor will recall that the
17 Government alleges three separate conspiracies. They
18 have a so-called Chicago - West criminal case with
19 five defendants. They have two, a California - Arizona
20 criminal case with three defendants; three, they have
21 a very limited Intermountain - Northwest case, civil case,
22 with only two defendants, limited only to the private
23 label sugar problem, which doesn't involve most of these
24 people on the plaintiffs' side. That is the Government's
25 number of actions throughout the country. Yet plaintiffs

2 - 29 1 here are suing as many as eleven defendants, alleging
2 conspiracy in all three cases.

3 For instance, my client, Amstar,
4 went through all this Grand Jury investigation, and
5 in any event, Your Honor, they were not included in any
6 of those indictments. And they were not included in
7 any of those civil cases. And yet they were joined in
8 all of the big cases here, simply, I guess, because we
9 happen to be one of the largest ones in the country.
10 But that was the burden that the Government was willing
11 to look straight in the eye and decide that we were
12 blameless in the matter; and we would not be joined.

13 But in any event, that is the
14 type of thing we are dealing with here, different people,
15 people not even involved in the Government's case. Now,
16 what did the Government allege? The alleged price
17 fixing with respect to a number of different elements.
18 They broke the price down. Each of these elements, by
19 their very nature, impact differently, depending on where
20 you are located, the volume you purchased, the terms of
21 purchase, the locality of the seller, the type of seller--
22 and I could go on for a number. They deal with the
23 basic price, they deal with the prepaid, they deal with
24 allowances, whether they be hauling allowances, competi-
25 tive allowances; they deal with delivered price.

So, even if, for the sake of argument here, we were to accept the Government's allegations for the purposes of argument, Government bills show at best that there were three conspiracies that emerged at various times over a twenty year period, twenty plus year period, with different combinations of participants relating to different elements of price, applicable to particular locations or particular customers. For example, they say in Rice Lake, Wisconsin, two defendants-- I think it was two, it might have been more-- withdrew an allowance collusively.

Now, of course, if the Government proves that, that is all they have to prove in a criminal case. But that is not enough for anyone here, not even including those people in Rice Lake, Wisconsin, that bought that. They still have to prove impact; and certainly it will do nothing for the rest of them with respect to impact throughout the country.

We try to point out in our brief some examples of how this impact question differs. For example, we said that a direct purchaser of liquid bulk sugar in Chicago who qualified for a 25 per cent allowance at a given time should not be permitted to represent a purchaser of bag sugar in Chicago or elsewhere who never qualified for that allowance; nor should he represent a purchaser of liquid sugar who bought through a jobber, who may have the advantage of allowances but did not pass it on or bought sugar from a non-defendant refiner. Nor should he represent a purchaser of individual serving packets such as we get in the restaurant who bought from a full line wholesaler and never received any allowance at all. Nor should he represent a large bottling company located in Chicago that bought its annual requirements on a contract basis for a year or so free from allowance. Nor should a large grocery chain in Los Angeles, which bought directly and qualified for a particular allowance, be able to represent a single outlet grocery store in Arizona, who bought from a full line food wholesaler who never got an allowance. Nor should he represent a Los Angeles chain that bought private label sugar on a contract basis. Quite a different way of purchasing sugar, quite a different relationship. And should he represent one who picked up his sugar at the refiner's plant and received no hauling allowance, as a practical

1 matter may be not available to the other members of the
2 class.

3 In short, the government's allegations of concerted
4 activity with respect of fixing of allowances to particular
5 customers is, with respect -- from time to time, and under-
6 scores our contention that none of the efficiencies envisioned
7 by Rule 23 will result from allowing these cases to proceed
8 as class actions. There are a number of cases. Mr. Freeman,
9 by changing the due process requirements of notice, gets
10 it down to four million cases. Says he has only four million
11 cases in a few of the states. But now he says we are going
12 to have the other states, so it will be much larger. But
13 the crux of the matter is the issue of impact cannot be
14 disregarded. The fact of the geographical area and duration
15 of the conspiracy, the identify of the persons allegedly
16 involved, the level of the distribution affected by the
17 practice, the product included, a host of other facts which
18 are relevant to determining impact, and therefore, whether
19 they recover or not in these cases, these questions are all
20 beyond the question of whether or not the defendants or
21 some of them -- because some of us aren't even charged --
22 have committed an offense that the government can prevail
23 on.

24 And I think this is their problem, that they too
25 readily grasp a government case without realizing the

1 tremendous problems of impact. Now, I suggest to Your
2 Honor that is why they didn't want discovery on this matter.
3 I suggest to Your Honor that is why they treat it very
4 cavalierly in their arguments. They don't want to argue
5 the facts in this case. They don't want to do as Your
6 Honor asks, to tell you what is the pattern in this case,
7 what kind of a pattern are you asking me to act on in this
8 case.

9 We have some representation that it is a conventional
10 class. I think that is absolutely wrong. I think the
11 facts in this case show that it is not. It is not the
12 model case. But even if we assume the single conspiracy
13 or three in the three different markets, the difference in
14 selling practices, as evidenced by the affidavit we put
15 in, demonstrates that there are predominant individual
16 questions. For example, defendants sell different products
17 at different times in different areas to different customers
18 on different terms; some f.o.b., some delivered price, some
19 meeting competition, through differing marketing channels,
20 some through brokers, some through jobbers, some direct,
21 some through wholesalers. There are different price compo-
22 nents involved, allowances, list price, tolling, price
23 protection, long term contracts, private labels; these are
24 all a host of different arrangements as the Judge saw in
25 the Transit Time case, that there was a host of different

1 arrangements there that did not lend themselves to class
2 action.

3 We took an example, and I would like to just briefly
4 refer to it again, pointing out that there would be no
5 saving in trial time, which, after all, is what Rule 23 is
6 all about, if you took these disparate actions and try to
7 put them together. And we said look at the Chicago-west
8 industrial class and take Leaf and Ambrosia Chocolates, which
9 happen to be divisions of W. R. Grace, they are alleged to
10 be members of the class located in Chicago and Milwaukee.
11 They have purchased respectively 50 million pounds and 55
12 million pounds of sugar annually, 90 per cent of which is
13 white granulated delivered in bulk rail carloads, 120,000
14 pounds to a carload. Leaf has its own rail siding and can
15 store 400,000 pounds of sugar. Ambrosia has its own bulk
16 sugar warehouse. They purchase directly from producers of
17 these defendants and others, except for occasional purchases
18 from wholesalers. Both companies have received competitive
19 allowances from time to time, and both companies have long
20 term contracts with three or possibly more of these
21 producers.

22 Now, let's look at Seeco, which also purports to be
23 in that class, and like these purports to be a representative
24 of that class. Seeco is located in Minnesota, purchases
25 one carload of sugar per year in 100 pound bags from a

1 company called Clinton Corn Processing in Clinton, Ohio.
2 Seeco does not know the identity of the producer of that
3 sugar. They don't know where it comes from, nor how or
4 where Clinton purchases that sugar. They don't know.
5 Seeco also buys molasses from a company called Kanapin
6 Molasses. Seeco doesn't know the identity of Kanapin's
7 supplier. They don't know where it comes from. As members
8 of the classes go -- now, Ambrosia-Leaf on the one hand
9 and Seeco on the other have something in common. They
10 both buy dry granulated sugar in quantities which the
11 industry calls industrial. That is true. But let's see
12 how their claims might be handled in a class action treat-
13 ment.

14 You will recall one of the matters in the government's
15 bill of particulars that we have referred to in our brief
16 is some hauling allowances were withdrawn collusively by
17 a couple of defendants in Rice Lake, Wisconsin. Now, none
18 of these people I have been talking about, Leaf or Ambrosia
19 or Seeco or other members of the class would be aided what-
20 soever by trying the issue of whether the pre-paid in Rice
21 Lake, Wisconsin, was fixed collusively. They are not
22 interested in that. Ambrosia-Leaf buy in Chicago and
23 Milwaukee and Seeco in Minnesota. There couldn't possibly
24 be any impact to them. And their sugar suppliers apparently
25 purchase from the defendant producer. Leaf would have a

1 claim, if direct shipping allowances on bulk sugar were
2 collusively drawn in Chicago -- but Seeco does not buy in
3 bulk period. And Ambrosia, of course, buys in Milwaukee.
4 But this points up the different questions, individual
5 questions as to each of these members of the class.

6 Let's take another one. If Seeco showed that there
7 was an allowance or a 100 bag of sugar, and that was
8 collusively withdrawn, or that a pre-paid applicable to
9 it was changed, collusively agreed to, then it might
10 establish a claim. But only if its supplier, Clinton,
11 bought sugar from the defendants and did not absorb the
12 resulting increase in price. And how many days of trial
13 would be taken on that one item which would have pertinency
14 only to Seeco and not to the others. So we can go through
15 this, and we have in our brief. I won't burden you further
16 with it here, Your Honor, because it is laid out to some
17 extent, I believe, of why there are individual questions
18 for these individual members of the class, why they pre-
19 dominate, and why they are not common questions.

20 The same thing is true that the difference in proof
21 of impact based upon purchasing practices, type and grade
22 of purchase, the locale of the plaintiff and the class
23 member precludes class treatment for each of the classes
24 proposed by the plaintiffs. We have a special problem in
25 this case because they have attempted to include the indirect

1 purchasers in the class. And so we have the Hanover problem
2 as Mr. Freeman talked about on the converse side of the
3 Hanover problem. The discovery seems to show, the limited
4 discovery we had seems to show that most of these purchasers
5 purchase indirect, but some purchase direct from the
6 defendants here.

7 But it seems to follow that a direct can't represent
8 an indirect because there is no incentive to show that the
9 middleman passed on the overcharge to the indirect member.
10 The indirect member is interested in that but not the
11 direct member. In fact, he is interested in the contrary.
12 And the indirect shouldn't be representing other directs
13 because the direct wouldn't want the pass through to be
14 shown. They have a different position on that. And we say
15 the indirects can't even represent other indirects because
16 they have compounded the problem of the proof of the impact
17 that I have just gone through. They have all the different
18 problems on whether or not they were impacted by any of the
19 various activities that are charged in the government bill
20 of particulars.

21 We also have in these cases the fraudulent concealment
22 allegations. And in the plaintiffs' reply brief they said
23 there was never any case that dealt with that. They are
24 wrong because the Transit Time case, a very excellent case
25 we have cited in several places in our brief, came down

1 early this year, takes that up and said in addition to the
 2 individual questions which are likely to arise on the
 3 issue of liability, plaintiffs have alleged that the
 4 defendants have fraudulently concealed the alleged violations
 5 since the inception of the alleged illegal practices about
 6 1930 in an attempt to escape the applicable four years
 7 statute of limitations. Therefore, plaintiffs will
 8 apparently offer evidence to establish that the class
 9 members remained in ignorance of the facts disclosing the
 10 existence of cause of action through no fault of their own,
 11 in other words, the due diligence requirement. This proof
 12 will more than likely involve much evidence which pertains
 13 only to individual class members. And it may bring about
 14 evidence on behalf of the defendants and their attempt to
 15 establish that the individual class members were not unaware
 16 of what they now claim was a cause of action. And if so,
 17 you have all of those individual questions which are
 18 individual to every member of this class.

19 Plaintiffs have suggested in their reply brief that
 20 really they only have, in a way, two different classes.
 21 And I think Mr. Kohn made that argument this morning, they
 22 have the direct and the indirect and they drew a chart on
 23 the direct. They show the refiner or producer at the top
 24 and a line down to each purchaser. And on the other side,
 25 they have the refiner with a line to the jobber, wholesaler,

1 dealer, and then the one to the purchaser. More likely,
 2 that is a wholesaler-jobber. I think they have compacted
 3 their examples. But in any event, this misperceives the
 4 manner in which both direct and indirect purchases are going
 5 to have to prove their claim. If we assume that a direct
 6 purchaser is trying to represent another direct -- let's
 7 take that one first. Each has to prove, for example, if
 8 it is an allowance problem, each has to prove that he was
 9 subject to that allowance which was allegedly collusively
 10 withdrawn at a time when the conspiracy was in effect. Each
 11 has to prove it was subject to a pre-paid and didn't buy
 12 f.o.b., if the question is a pre-paid. Each has to prove
 13 no long term contract, no price protection agreement, no
 14 tolling agreement -- some have tolling agreements -- no
 15 points over contract. Each has to prove they bought from
 16 the defendants. Each has to prove fraudulent concealment.
 17 Each has to defend the counterclaim, or most of it. Each
 18 has to prove the absence of special allowance. Each has
 19 to prove that it bought the type of sugar that was subject
 20 to the alleged collusively practice. There are many types
 21 of sugar involved here. Now, if you take the indirect,
 22 he has to prove all of these same matters and all of the
 23 different levels of distribution. He has to prove that
 24 each jobber and wholesaler up the line was subject to all
 25 these foregoing matters that I have detailed. And it is

1 complicated by the fact that he doesn't even know where,
 2 upon what terms the middleman bought his sugar. In other
 3 words, the middleman up above him someplace may have bought
 4 from a Gulf refiner. He may have bought at a different
 5 time than he resold to the plaintiff or the class member.
 6 He may have bought at volume allowances or hauling allowances
 7 or pre-paid not available to the indirect plaintiff. He
 8 may have bought f.o.b. and charged delivered freight plus
 9 local drayage to the indirect purchaser. So you can't even
 10 separate out those elements of the price. It may have been
 11 delivered with other products with the bottom line on
 12 invoice for the delivery of all products.

13 Finally, the middleman may not have passed on all
 14 or part of the sugar price claimed to be the overcharge.
 15 Therefore, the separate questions of impact for each and
 16 every direct purchaser are multiplied many times over for
 17 the indirect purchaser on account of the lines of distribu-
 18 tion and because of this pass through issue which
 19 Mr. Freeman was talking about.

20 Turning just quickly now to the various, the three
 21 state classes -- and we will deal first with the one in
 22 which -- Illinois, Minnesota, Kansas, Washington, Oregon
 23 ask that they be allowed to represent all other unrepresented
 24 sovereigns in Chicago-west and inter-mountain northwest
 25 territory. I am coupling that together. Oregon and

1 Washington are seeking to represent the others in the
 2 northwest, and the other midwest states in the Chicago-
 3 west market. Judge Frankel writing in 32 Anti-Trust Law
 4 Journal referred to a Law Review Article by then Professor
 5 Jack Weinstein, who was later on the bench in New York.
 6 And Judge Frankel said this

7 "Weinstein, in considering this
 8 question of whether class action
 9 is superior to other devices,
 10 suggested among other things that
 11 the class action might not be
 12 suitable where the proposed class
 13 consists of a group of economically
 14 powerful parties who are obviously
 15 able and willing to take care of
 16 their own interests individually
 17 through individual suits or individual
 18 decisions about joinder or inter-
 19 ventions."

20 Judge Pense in 9 Utah, the right to represent those
 21 states in the western areas which have not previously filed
 22 anti-trust actions in the pipe cases, cited Judge Frankel's
 23 statement with approval. One of the fine lawyers on the
 24 plaintiffs' side here, Mr. Blecher, addressed the Ninth
 25 Circuit judicial conference which Your Honor may recall,

1 aligned himself with Judge Pense, Weinstein and Frankel
2 to the effect that "Governmental bodies, well aware of
3 litigation, already centralized under 1407, have no need
4 of class representation."

5 As pointed out in our brief, Judge Sirica in the
6 ampicillin anti-trust litigation refused to certify a
7 class consisting of otherwise unrepresentative state and
8 political sub-divisions, although Judge Sirica certifies
9 some very broad classes in that ampicillin litigation.
10 That was too much for him, so I think when we look at the
11 record and note that Judge Sirica, Judge Pense, Judge
12 Frankel, Judge Weinstein, and certainly Mr. Blecher, are
13 not hostile to anti-trust actions. And they see it this
14 way. And the courts see it this way, that certainly this
15 should be denied. These other states should not be
16 allowed to represent those people who have chosen through
17 their own attorney generals not to come forward here. We
18 have all got enough work. Your Honor has got enough work,
19 and we shouldn't haul them in here. They are big boys, all
20 of them.

21 Now, going to the proposed class of all political
22 sub-divisions within the states, we say that is also
23 inappropriate in this case. Plaintiff states have presented
24 no records on which class determination can be made.
25 Judge Pense pointed out in the Utah case -- there the

1 plaintiff came in with a list. He didn't say those people
2 bought pipe. They just came in with a list. I submit here
3 the plaintiffs haven't even represented to you that they
4 buy sugar. They haven't given you a list. There is no
5 record whatsoever. We have attempted to make a record by
6 taking the deposition of people, representatives of
7 California, Illinois, and Minnesota, and those depositions
8 show nearly a total ignorance of how their sub-divisions
9 buy sugar. We have been able to develop through interroga-
10 tories and others that the local sub-divisions, to the
11 extent they buy sugar, and many of them don't buy it, buy
12 it in a much different way than the state. The states
13 seem to bid for it. Many of the local agencies do not.
14 The states often have yearly contracts. California
15 actually requires its bidders to guarantee a price at a
16 specified level over the New York raw price. In other
17 words, that is a standard which these best people -- and
18 even though I represent one who is also cane, have absolutely
19 no control over. That is a totally different way of
20 purchasing than the local sub-divisions in the State of
21 California. The State of California can't represent those
22 people. Their claims aren't typical. They lack common
23 questions. They can't adequately represent them because
24 they are not talking about the same ballgame. They are
25 talking about an entirely different series of transactions.

1 Now, just very quickly directing my remarks to
 2 Mr. Freeman's remarks on the consumer class. Illinois
 3 claims at each stage of the marketing process the wholesaler,
 4 broker, and the retailer add a percentage markup to the
 5 cost of sugar to cover overhead and profit. In short,
 6 those states say that the alleged overcharges have been
 7 passed on through the distribution chain to the consumers.
 8 This difference between the industrial group and the whole-
 9 sale grocers and the retail grocery stores as to which
 10 group has the claim is precisely the issue -- and it is
 11 best illustrated by Mr. Freeman's letter to Your Honor
 12 complaining about the disclosure of the Holly Settlement
 13 prior to ruling on these motions. All of the recent
 14 cases have rejected consumer class actions of the type here
 15 as unmanageable. Our Court of Appeals twice last year
 16 reversed the certification of consumer classes on these
 17 grounds. One was the hotel telephone charge case and the
 18 other was Kline v. Colwell Banks. Those are cases cited
 19 in our brief -- reversed those and said they were unmanage-
 20 able, that common questions didn't predominate.

21 The cases relied upon by plaintiff states here were
 22 either based upon settlement classes -- and that is a group
 23 of cases which we referred to at Page 9 of our brief,
 24 ampicillin antibiotic and Bristol Meyer. They rely on the
 25 State of Virginia settlement classes, and they are all relying

1 on pre-Eisen language.

2 Here again the state claims are not typical of
 3 consumer claims. I think Mr. Freeman really gave us the
 4 facts on that. The consumers buy at the grocery store.
 5 No state I have ever known of comes into the grocery store
 6 to buy sugar. They get it through long term contracts.
 7 They get it under contracts which have the most favored
 8 nation clause in them, totally different way of buying
 9 sugar. No way they have typical claims of the consumers.

10 Mr. Freeman was urging on you to go back and talk
 11 about the pot of gold in the fluid recovery. Our Court of
 12 Appeals in the Ninth Circuit has spoken to that. They
 13 have made it very clear that they are not going to allow
 14 the substantive law to be eroded in order to come up with
 15 these fluid class recoveries. It talks about the notice
 16 they make. They have great reliance in their brief upon
 17 the order by Judge Mickets in Arizona in the milk bottle
 18 case where initially Mickets had an order that there was
 19 going to be a notice on the milk bottles. Of course you
 20 have a much smaller class in the State of Arizona. That
 21 order -- and I don't believe, I am sure the plaintiffs are
 22 not aware of this yet -- that order has been vacated
 23 because of the obvious problems that occur in telling people
 24 that have private label and other people who have nothing
 25 to do with the defendants in the case what notices that

1 they are going to put on their products. They talk about
 2 Master Keys, but they fail to find out that Master Keys --
 3 that there is another decision in Master Keys five years
 4 ago, before Judge Blumenfeld made his ruling back in 1970.
 5 Another judge in pre-Eisen days held the tentative class,
 6 so that case had been proceeding for five years as a class
 7 action. The fact that Judge Blumenfeld finally crossed
 8 the T on the order gives them no benefit. That is a pre-
 9 Eisen case. Furthermore, as we point out in our memorandum
 10 at Page 10, Master Keys, Connecticut General Motors, UACAF
 11 case, Western Asphalt. These cases don't attempt to
 12 create citizen-resident classes. They involve, in the
 13 Master Keys case, builder owners of buildings. In the
 14 Unger case, franchisees of the defendants. And we also
 15 point out in the Western Asphalt case that the court
 16 expressly noted, the Ninth Circuit expressly noted "We
 17 do not have a case of consumers who have only a minuscule
 18 interest in the outcome of the litigation." That was not
 19 a class action. That is what we have come to know in the
 20 west as the Boldt-Pense type of intervention, which Your
 21 Honor has used for Alkali, and Watergate, and many other
 22 cases and Judge Pense in the pipe cases. Asphalt is
 23 wrongly used there.

24 There is some reference, a very brief reference
 25 to an agricultural class. And again I point out in closing

1 that what is being asked of Your Honor there on that class
 2 typifies the plaintiffs' request of Your Honor. There is
 3 no complaint on it. They have attempted to interject the
 4 item by re-defining a definition someplace in some of the
 5 papers. We have heard nothing about it except an allusion.
 6 We have heard more about it in the 90 seconds that
 7 Mr. Cochran gave to it this morning than we have ever heard
 8 before. There is absolutely no record on this. No one has
 9 really had a chance to know what it involved here. No
 10 seeks a national class. This is not involved in the
 11 government cases in any way, shape, or form, and it would
 12 be entirely wrong, I think, Your Honor, to even consider
 13 today that class. Or, at the most, if it is to be considered
 14 it must be denied because there is absolutely no record on
 15 it.

16 So, Your Honor, it is true that we end where we began.
 17 And we began with the though which has been buttressed in
 18 this case and which the plaintiffs have not disproved
 19 because they have made no record, that this is not the
 20 typical anti-trust case which has had certification in the
 21 past. This is the atypical anti-trust case which has not
 22 received certification, and why? Because the issues that
 23 are individual to each member of the class, each purchaser
 24 predominate. The common questions do not, because of the
 25 manageability problems which are rampant, because of the

1 fact that by and large these are big people. They can
 2 file their actions as they have. Many able lawyers here
 3 have filed actions for them, and they may file more. But
 4 they can do that. For example yesterday one was filed by
 5 Dickinson, which is a small company making jello. The
 6 Dickinson family. Very fine product. They had no trouble
 7 finding a very fine lawyer, Mr. Ferguson. So this isn't
 8 a case where people can't come in to this multi-district
 9 litigation and process their claims before Your Honor in
 10 a very fair, quick manner. These classes should be denied.

11 THE COURT: Does that conclude the
 12 defendants' presentation, Mr. Raven?

13 MR. RAVEN: I would like to hear what
 14 Mr. Kohn says, and then perhaps --

15 THE COURT: You don't want to be
 16 heard any further at this time?

17 MR. RAVEN: No, unless some of my
 18 colleagues would like to add something.

19 THE COURT: As I said before, you have
 20 approximately 20 minutes or thereabouts remaining of your
 21 time.

22 MR. FREEMAN: I would like to use
 23 some part of that time.

24 MR. RAVEN: May I interrupt? My
 25 colleagues say I misspoke and said that Mr. Blecher --

1 Mr. Ferguson, rather, brought their own class cases. I
 2 didn't mean to say that. I meant to say they brought their
 3 own individual actions.

4 THE COURT: I noticed that.

5 MR. RAVEN: I saw Your Honor look
 6 at me a little perplexedly, but I knew that might be for
 7 any number of reasons.

8 MR. KOHN: If Your Honor please,
 9 the main burden of carrying forward American life and
 10 American civilization's judicial administration has been,
 11 in large part, carried by people who are what might be
 12 termed moderate, people who are reasonable, people could
 13 sense distinctions and differences, who were not extreme
 14 on one side or extreme on the other, people who don't say
 15 that every case must be a class suit, people who don't
 16 say that no case can be a class suit, people who can draw
 17 a distinction between a class of 5,000 persons and a class
 18 of eight million persons. And I think the steering
 19 committee, the executive committee on whose behalf I am
 20 speaking has chosen the moderate course which has developed
 21 American law and brought it to the point where it is.

22 Either extreme means the end, for all practical
 23 purposes, of Rule 23, which everybody recognizes is a
 24 salutary rule which has advanced judicial administration,
 25 which has saved judicial time, which has brought justice

1 situations where without Rule 23 there would have been no
 2 effective remedy. We recognize that there are problems
 3 of manageability in connection with certain classes, and
 4 we don't urge that you support or certify an unmanageable
 5 class. There are situations, for example, where consumer
 6 classes are entirely manageable. We have cited in our
 7 brief case after case -- take, for example, the Saks-
 8 Bergdorf Goodman case where our firm, among many others,
 9 was in. They have a cast that is relatively confined,
 10 some two or three hundred thousand people, all of whose
 11 names are reported on the books of the defendants, all of
 12 whose purchases are reported in black and white, so that
 13 when it comes time to prove their damages, if there has
 14 to be a trial -- and I doubt whether there will be one --
 15 but if there has to be a trial, the simple way of proving
 16 their purchases is by a request to admit that which is on
 17 the defendants' own books, a very easy way to do it.

18 Similarly here, when it comes to the grocers or when it
 19 comes to the industrial users, all they have to do is file
 20 their request to admit what is on the books either of the
 21 defendants or on their own books in documentary form.

22 So that is a far cry from a situation where people
 23 will have to estimate what they have purchased, where a
 24 woman with \$5.00 of purchases who maybe lived in California
 25 four years ago and now is living in Florida -- how do we

1 cover her? Or where a person is living in California now
 2 who was living in Florida four years ago, or somebody in
 3 the service who is now in Europe. How do we cover those
 4 situations? I think reasonable men won't press too far.
 5 I think I had the first Rule 23 case, the brass and copper
 6 mill case back before Judge Fullen back in 1966 or 67. I
 7 honestly hope, Judge, that I don't have the last one. And
 8 if we adopt either extreme this will, for all practical
 9 purposes, be the last case that anybody will have sought
 10 to have certified under Rule 23 because if we adopt what
 11 Mr. Raven suggests, then you will never certify the case.
 12 If this case isn't certifiable on behalf of the classes
 13 we have requested, no anti-trust case will ever be certifi-
 14 able. On the other hand, if we go to the other extreme,
 15 then all of the material that the defense counsel have
 16 been putting forth for years that the American College of
 17 Trial Lawyers, which is trying to get Rule 23 has putting
 18 forward will, in truth, materialize. When somebody does
 19 get \$1.98 and it costs \$3.98 to administer it and when
 20 counsel get fees, then perhaps you do have some basis for
 21 criticism.

22 So I am urging, I think we are all urging,
 23 Mr. Ferguson and our committee, urges that we adopt the
 24 path of moderation. Don't throw the baby out with the bath,
 25 and don't put so many babies into the bath that the tub

1 can't hold the water and the babies sit there smothering
2 each other.

3 Now, Mr. Raven seems to feel that nobody has set
4 forth what is the pattern. I don't like to read extensively
5 when I argue. I would have assumed that he read our brief.
6 But if Your Honor will indulge me for two or three minutes,
7 let me just read a few paragraphs which set forth the common
8 pattern, which set forth the common issues which are common
9 to the government actions, which are common to the bill of
10 particulars, which are common to every single complaint
11 filed here.

12 No fine sugar is made by processing sugar beets or
13 by refining raw sugar which is derived from crushed sugar
14 cane. Grocery sugar is sold to grocery wholesalers and
15 retailers for eventual sale to consumers. Industrial
16 sugar is sold in liquid or dry form, in bag or bulk, to
17 firms engaged in the preparation and manufacture of food
18 and beverages. No matter how it is derived, it winds up
19 that way. And if it is different, I am very curious as
20 to why they manage to have precisely the same price to
21 the fraction of the penny right down the line through the
22 years for each of the various types. And the various
23 types bear a direct and continuous relationship to each
24 other.

25 Approximately 22 per cent of the sugar sold in the

1 United States is sold as grocery sugar. Nearly all of the
2 remainder is sold as industrial sugar. The next paragraph
3 states the amount sold, a value of two and one half billion
4 dollars. Then continuing,

5 "During the period of time
6 covered by this complaint, the
7 defendants received substantial
8 . . ."

9 This particular defendant, C & H, which I take it
10 has abandoned, Mr. Raven,

11 ". . . received substantial
12 quantities of raw sugar derived
13 from sugar cane grown and crushed
14 in the State of Hawaii. There
15 was a substantial and continuous
16 flow in interstate commerce of
17 said raw sugar from the State of
18 Hawaii to the State of California,
19 where it was refined by the
20 defendant, California and Hawaiian
21 Sugar Company and sold in the
22 market."

23 That is a common fact, and as Your Honor will recall
24 from the Blackie and Bennett case, if there is a common
25 issue -- and the court itself, the Court of Appeals underlined

1 this -- a common issue of law or fact, you have commonalty.
 2 These are certain facts which are common. And it would be
 3 an abuse of judicial time to have to prove this in 5,000
 4 separate cases brought by 5,000 separate industrial
 5 processes or by 29,000 separate grocery chains. Continuing

6 "During the period of time
 7 covered by this complaint, cane
 8 refineries and sugar beet processing
 9 factories of defendants and co-
 10 conspirators were located in the
 11 various states of the United States,
 12 and substantial quantities of the
 13 sugar refined and processed at
 14 these refineries and factories
 15 were sold and shipped across state
 16 lines to customers located through-
 17 out the market. There was a sub-
 18 stantial and continuous flow of
 19 refined sugar in interstate commerce
 20 from the cane refineries and the
 21 sugar beet processing factories of
 22 the defendants and co-conspirators
 23 to their customers, the plaintiffs
 24 and the class.

25 "Beginning sometime prior to

1 1955 and continuing thereafter
 2 at least through 1972, the
 3 defendants and co-conspirators
 4 engaged in a combination and
 5 conspiracy in unreasonable
 6 restraint on the aforesaid inter-
 7 state trade and commerce in the
 8 particular market. . ."

9 And each one of these cases is divided up so that
 10 it concerns a particular market where the particular
 11 plaintiff does business. If he does business only in
 12 Chicago-west he claims only to represent the class in
 13 Chicago-west. If he does business only in California, he
 14 claims only to represent the California market. And the
 15 defendants, as you will note from the Exhibit A, Appendix
 16 A to their brief which I supplied to you, had no difficulty
 17 whatsoever in ascertaining where there six classes, however
 18 they may try to fudge and confuse it in the lengthy brief
 19 and the protracted argument which we heard just a moment
 20 ago

21 "The aforesaid combination and
 22 conspiracy consisted of a
 23 continuing agreement, understand-
 24 ing, and concert of action among
 25 the defendants and their co-conspirators,

1 the substantial terms of which
2 were, among others, in each case,
3 to fix and raise the basic price
4 of refined sugar, to fix pre-paid
5 freight applications, to eliminate
6 reduce and prevent the giving of
7 allowances to customers for refined
8 sugar, and to fix, raise, maintain,
9 and stabilize the effective selling
10 price of refined sugar."

11 Then it continues with a list of other things.

12 "In formulating and effectuating the
13 aforesaid combination and conspiracy,
14 defendants and co-conspirators did
15 those things which as here and before
16 alleged, they combined and conspired
17 to do including, among other things,
18 A, caused brokers and other third
19 parties to act as go-betweens in
20 carrying price information and
21 exchanging assurances on price
22 actions between and among refiners,
23 discussed data and reached agreements
24 concerning the formulation of pre-
25 paid freight applications for the

1 purpose and with the effect of
2 maintaining uniform pre-paid
3 freight applications, published
4 basic price lists and pre-paid
5 freight application tables in
6 accordance with agreements
7 reached.

8 "The aforesaid combination
9 and conspiracy has had the follow-
10 ing effect. . ."

11 And this is certainly common,

12 "The price of refined sugar has
13 been raised, fixed, maintained,
14 and stabilized at artificial and
15 non-competitive levels. Purchasers
16 of refined sugar have been deprived
17 of free and open competition in the
18 sale of refined sugar, competition
19 between and among defendants and
20 co-conspirators has been restricted,
21 suppressed, and restrained,
22 plaintiffs and the members of the
23 plaintiff's class have paid higher
24 prices for defendants refined sugar
25 than they would have otherwise paid

1 in the absence of the conspiracy
2 and have been injured and damaged

3 . . ."

4 And so on.

5 Now, Your Honor will remember back in the electrical
6 cases the same arguments were raised, and the same arguments
7 would apply to an individual defendant trying to recover
8 as well as to the class. The scattered charts would show
9 prices which apparently were all over the horizon so that
10 there was no uniformity of pricing. And therefore they
11 said the conspiracy was completely ineffective and you
12 couldn't prove damages. But when you looked closely at
13 what they sought to confuse you with by putting 10,000
14 dots to show each sale, you saw that the dots had a sweep,
15 that they went up like this, and in the White Sale they
16 went down. When the White Sale was over they went up
17 again. Even though there may have been differences of
18 as much as 20 and 30 per cent between the top and the
19 bottom price at any one time, there was nevertheless this
20 sweep. So that regardless of where you were in the market,
21 you were adversely affected. And despite the broad range
22 at any particular time, they were able to have price
23 indices to the penny. I should have brought my famous
24 P-47 exhibit that was introduced to show how the prices
25 went up.

(Continued on next page)

4 - 1

1 The defendants were able, them-
2 selves, for their own purposes, to draw a line. And
3 we know we have price indices. We have a cost of living
4 index, for example, that shows the price that people
5 pay for any commodity or for all commodities. You know
6 that if you go into four grocery stores the price is
7 different in each one. One is having a price war, one
8 is not, and so on down the line. I think the problem
9 is that the defendants are just as unable to distinguish
10 between evidences, pieces of evidence which prove an
11 overall pervasive conspiracy as they are unable to
12 distinguish between a class of 5000 and a class of eight
13 million.

14 And I think that inability to
15 make reasonable distinctions to guide your life by a
16 reasonable application of things that you know, as you
17 charge the jury to use common sense when you deal with
18 matters of importance to you. Just as the jury is
19 required to use common sense.

20 Now, let me cover in a little more
21 detail some of the things that Mr. Raven told you. First
22 of all, we had, what I take it was, a gentle attack on
23 plaintiffs' counsel in class suits with his opening
24 remarks. In this case, Your Honor, we have sought to
25 avoid the divisiveness, the difficulties, the problems

4 - 2

1 between plaintiffs' counsel, which are one of the
2 problems in managing, not so much class suits, as
3 multidistrict suits as well as class suits. I think
4 we have succeeded admirably. You have had a remarkable
5 amount of cohesion among counsel. You have had Mr.
6 Ferguson acting as our chairman with practically no
7 discord with one exception of the letter you received.
8 Mr. Raven says the more lawyers you have the more you
9 delay. We have never once asked for an extension of
10 any consequence for filing anything. I think we had
11 one two day request for extension. Who has been asking
12 for it? It has been the defendants who have sought
13 delay again and again, not plaintiffs.

14 We have managed very well to run
15 our ship. And I say, what is the difference between
16 having ten firms with five lawyers each on one side or
17 having five firms with one hundred lawyers each on the
18 other side. And I don't want to go into the question
19 now of counsel fees. And I think it is highly inappropriate
20 to suggest that Your Honor will not be able to
21 determine who has done what work at some later date if,
22 as and when we approach the problem of counsel fees.

23 But I do say, as I have said
24 before, and there has been some quotation by Mr. Raven
25 with regard to what other people have said at seminars

4 - 3 1

2 and whatever-- I will wager-- and I may get a knife
3 in the back in a moment-- but I be willing to stipulate,
4 as I stipulated with regard to other matters, which I
5 think you must as a matter of common sense, that we
6 will accept as our total number of hours what they bill
7 their clients for their number of hours in this case.
8 Perhaps we could even extend it further to the counsel
9 fees. I think we should be tired by this time of that
10 kind of personal attack on counsel. I think our conduct
11 here has been exemplary in minimizing the problems
12 which this Court has to deal with. And I think we can
13 continue admirably to do so.

14 The function of the Court will
15 be to certify the classes. If you believe that for some
16 reason or other if four names as listed as the representative
17 of the class, if that somehow is going to
18 interferewith the work-- and I don't think it ever will
19 as it hasn't in the past-- and it ought to be reduced
20 to one, that is entirely within Your Honor's province
21 and it can be done. That is no reason for not certifying
22 the class.

23 If at some point we do reach trial--
24 and I would say that judging by what the more temperate
25 members of the defendants have done, we may never have
that unhappy or happy problem to cope with, trial-- Your

1 Honor, as Judge Milesford (phonetic) did in the
 2 Tetracycline cases, has the right as a transferee judge
 3 to be a transferor judge and put all the cases right
 4 here. And everybody on the defendants' side ought to
 5 know that by this time and not try to trot before you
 6 the spectre that we will have 4 cases or 5 cases or 12
 7 cases going back to 12 different courts to try.
 8 Everybody knows that will not happen because no common
 9 sense judge administering law today under Rule 23 under
 10 the multidistrict panel, under 1404 and 1406, will
 11 permit it to be done.

12 If at some point the horrible
 13 result should come and it does happen, you can then
 14 single out the one case which is the class representative
 15 case and delete the others. That, I think, is a red
 16 herring which nobody ought to have to conjure with
 17 beyond the statement of it.

18 He made great reference to
 19 different products, different terms, different bases.
 20 There isn't an industry in the United States that
 21 doesn't have different products, different terms, and so
 22 on. But when they conspire, as they did in the electrical
 23 cases, as we have in the Sak's case, as they did in the
 24 Master Key case, and in the gypsum case. We had a
 25 tremendous variety and combination of sales methods in

1 any class. The courts have been able to cope with that.
 2 I think Judge Robson many, many years ago-- comes back
 3 to me when I was trying the case against, I think it was,
 4 ITT which was recalcitrant and wouldn't settle until
 5 the very end. We got to the point where we had to pick
 6 a jury. There were about a dozen of us left at that
 7 time, a dozen different plaintiffs who bought products
 8 of all kinds from all over the country, from the
 9 electric company in the East to the Southern California
 10 Edison, whatever their name is.

11 Judge Robson appointed an
 12 economist who was able to do precisely what, I think,
 13 anybody with common sense would do. He got an index
 14 number and determined the percentage of overcharge on
 15 each. And that is precisely what the jury in our case
 16 did. We had three different public utilities who had
 17 bought products over a period of fourteen years, and
 18 the jury determined that as a reasonable matter the
 19 average overcharge was twenty-five percent. I think
 20 the economist who went through a much more involved and
 21 scholarly examination came up with something like 23 or
 22 27. It was very close to it because it was manifest
 23 that over the period of years the prices had been 25
 24 percent higher on the average than they ought to have
 25 been.

4 - 6 1

THE COURT: I think you have
exhausted your time, if we are going to hear Mr. Freeman.

MR. KOHN: How much time did I
have, Your Honor?

THE COURT: About fifteen minutes
up to now.

MR. KOHN: Could I have just three
more?

THE COURT: A few further remarks
and then Mr. Freeman may speak. Then defendants, if they
see fit, may wish to speak further.

MR. KOHN: All right, let Mr.
Freeman speak.

THE COURT: All right, Mr. Freeman.

MR. FREEMAN: I would like first
to answer the defendants because I assume they are the
ones that are disputing with me the class action certi-
fication that we seek.

THE COURT: Yes.

MR. FREEMAN: Mr. Raven mentioned
the Arizona case and said that the order had been vacated.
That is true, but not completely accurate, because there
was a question of whether or not an appeal would be taken
from that order. And there was to be further consider-
ation given to the order. So, as a convenience and to

4 - 7 1

avoid the appeal, the judge did yesterday vacate the
order, but only for the purpose of preventing the
time from running against those people who said they
were taking an appeal unless there was some modification.

In the Liquid Asphalt case that
was mentioned, the Court does say we don't have here a
miniscule type of consumer, but the Court was saying that
in connection with the real wallop that occurs at the
end of that paragraph, when he says, "Therefore, we are
not going to let these big fish escape the net because
they were very big."

Now, it is interesting to note
that Mr. Raven has not answered the arguments that I
made with respect to the consumer class. He has not
answered the very express and specific references I
made to the Eisen decision and its supportive character.
He has mentioned the Elise and hotel telephone cases
decided by the Ninth Circuit as the authority for the
elimination of consumer or large classes. Those cases,
as we point out in our brief, in our view-- and I think
it is a fair view-- were determined because of the
excessive number of defendants and defendant classes
that are sought there. The court points out that each
defendant would have had to have an individual trial to
determine what its practices were in connection with real

1 estate sales or telephone surcharges. And that permeates
2 the opinion. They are very strong opinions in that
3 respect, but they do not reject the idea of a large
4 plaintiffs' class with defendants in the position that
5 are here.

6 And furthermore, the later
7 decision of Blackie vs. Barrack decided September 25,
8 1975, by the Ninth Circuit, stands as the last word
9 from that Circuit.

10 Now, mention was made of Judge
11 Sirica's decision in the Ampicillin case. Judge Sirica
12 did certify a consumer class-- I have to be immodest
13 too-- which we accomplished before Judge Sirica, and
14 then sustained in the Court of Appeals for the District
15 of Columbia. Judge Wyzanski was sitting by special
16 designation on that Court, plus two circuit judges, and
17 by unanimous decision the consumer classes established
18 in the Ampicillin case, which are much broader than the
19 cases here, both in number and concept, were sustained
20 by the Court of Appeals with specific reference to a
21 decision by the United States Supreme Court in Hawaii v.
22 American Oil, which Judge Wyzanski construed to be the
23 Supreme Court's favoring the certification of consumer
24 classes. He says so in his opinion.

25 Now, some of us claim to be the

1 first and not wanting to be last. Well, I don't think
2 the first class action was the Brass Mill Tubing case.
3 I am unfortunately possibly the one who filed the first
4 class action involving public entities in the United
5 States, and it was Illinois v. Brunswick Balke. It was
6 before Judge Robson and Judge Zerpoli here in California,
7 several other judges. It was before 1407, but we
8 developed a consolidation of the cases in Milwaukee.
9 It involved thousands and thousands of purchasers, public
10 entities in that instance, and I don't propose to be the
11 last.

12 And, Your Honor, I am confronted
13 by a strange kind of embarrassment here, an embarrassment
14 that is deliberately being provoked. I have no problems
15 with the defendants. I think Mr. Raven has, in effect,
16 defaulted on the establishment of consumer classes, and
17 that is a strange circumstance because mention was made
18 of a dissident. That is no. Mention was made of--

19 MR. RAVEN: Not by me.

20 MR. FREEMAN: You didn't mention
21 a dissident. More in temperate members-- that is no. My
22 learned colleague-- no, Mr. Raven has been a complete
23 gentleman as all of the defendants have been. Because,
24 Your Honor, the strange part of this letter that I wrote
25 to you, and which I didn't think was coming up today, but

4 - 10 1 certainly the circumstances--

2 THE COURT: By the way, I should
3 mention to you that perhaps I should apologize for not
4 having replied. But all I could possibly have said in
5 reply would have been, "Your letter has been received.
6 Very truly yours."

7 MR. FREEMAN: Your Honor, I
8 think it was an imposition on you for me to have sent
9 that letter. But I was absolutely in a corner, there
10 was no where I could go, and Mr. Kohn has demonstrated
11 the depth of that concern that I must have.

12 THE COURT: Don't be concerned
13 about it.

14 MR. FREEMAN: I am not concerned
15 about writing the letter. I am concerned about with
16 whom I am associated. But the defendants, you see, in
17 their settlement negotiations were willing to accept a
18 consumer class. But who are the ones that are now
19 arguing against the consumer class? The person who
20 argued against it, now claiming that it was an extreme
21 thing that couldn't be managed, was representing the
22 wholesalers and grocers. And he is contending for a
23 windfall for them rather than the catch basin that would
24 result with the injured consumers being compensated
25 for the injuries they received. I think it is a very

4 - 11 1 unfortunate situation that occurs here because, at least
2 I have always stood for unanimity among plaintiffs'
3 counsel, both by words and by actions.

4 But the only argument that is
5 made against the states that are here represented and
6 their attempt to represent the consumers is not by
7 the defendants but by an associate counsel who, I don't
8 think, represents the group that he says he represents.

9 At any event, pardon me for the
10 embarrassment and for the fact that I must bring to your
11 attention my wounded feelings. And I hope that someday
12 or another the Court will recognize the scope of the
13 confusion that Mr. Raven deals with when he speaks of
14 these multitudinous groups of lawyers acting, apparently,
15 under the leadership of the previous spokesman. There
16 is something wrong with the whole process when this
17 case can be turned around, not from a class represen-
18 tation or class representative point of view, but some-
19 how or other from an evil, deceptive, unwarrantedly
20 insulting attitude of the first and the last and the
21 extreme and the intemperate.

22 I think Your Honor will decide
23 this on the basis of the facts and the arguments that
24 are made and not on the basis of the settlements that
25 have now or are about to be presented to you and what

4 - 12 1 these self seekers of advantage want to achieve as far
2 as class certification is concerned. Thank you.

3 THE COURT: Do you wish to reply,
4 Mr. Raven?

5 MR. RAVEN: It will take no just
6 a minute, Your Honor.

7 THE COURT: All right.

8 MR. RAVEN: First, Your Honor, and
9 I think Your Honor knows this as well as I, I didn't
10 attack anyone. It doesn't make any difference to me
11 what people get as attorneys fees. I hope that everyone
12 in this Court prospers, and many of them have. But I
13 brought up the very thing that is in the manual, some-
14 thing that Your Honor knows a lot about, on Page 16 that
15 says if anyone that files a complaint can become a
16 representative of the class, it can just go like that.
17 And all of these economies that are to be furnished by
18 Rule 23 and by this type of litigation go out the window.

19 I think, you know, I think this
20 is the case of the guilty flesh where no man pursueth.
21 I agree with Mr. Kohn that you have to be reasonable on
22 these things. And the best example of this is that
23 Judge Cassn, your colleague from Philadelphia that has
24 some of these cases, recently certified a Mercedes Benz
25 class on repairs. It made a lot of sense. It was a

4 - 13 1 claim that there was a schedule that they all abided
2 by on prices, a very, very simple, model conspiracy.
3 Everyone affected by one piece of paper, by one agree-
4 ment on price, and impact the same. And that's the kind
5 of case that should be certified. I believe in class
6 actions. I think they should be used where they are
7 proper. But I think they shouldn't be prostituted
8 either.

9 And what did Mr. Kohn get up here
10 and argue about? He read from the complaint. If you
11 can file a complaint and on that alone have a class,
12 then we might as well just all go away. But it is not
13 that simple. Blackie pointed out, the Court of Appeals
14 just writing on this, pointed out the judge has to find
15 out what we are talking about. And that is exactly
16 what Your Honor asked for when he said, tell me about
17 the pattern in this industry. And I take it, Your
18 Honor, when you asked about the pattern in this industry,
19 you were not asking how sugar was made, from sugar beets--
20 you were asking, how is it distributed? What are the
21 arrangements? What impact, where might impact differ?
22 He had no mention of that, even with Mr. Kohn, when he
23 got up here before, because he doesn't want to talk
24 about those facts. They didn't want discovery on them,
25 they don't want to talk about them. They know if the

spotlight is put on them, you can see these individual questions. So they haven't given you the pattern that you have asked for.

Now, I am not going to take time to reply to Mr. Freeman, other than to say we haven't defaulted, but I would be wasting Your Honor's time if I spent a lot of time debating consumer classes when the Court of Appeals in this circuit has spoken definitively on it twice in the last year. And I will rest with that, Your Honor.

THE COURT: That will conclude the argument on class action, unless when we reconvene I have some other thoughts to suggest on the subject. It is 20 minutes to 1, and I would suggest that we reconvene at 2:00.

(Whereupon the court recessed.)

AFTERNOON SESSION

(Whereupon the Court reconvened after lunch, all parties being present, on December 8, 1975.)

THE COURT: It may be that on full consideration on the argument and the memoranda that I will want additional information on one or another of the subjects involved. If so, you will hear from me next week. Other than that, the class action motion is deemed submitted as of this time.

Now, we have several other motions listed here, and as far as I am concerned, I see no reason why we can't proceed in the order they're listed. That would bring us to No. 3, the Motion to Dismiss and so forth with sanctions.

MR. FERGUSON: Yes, Your Honor. That would be the defendants' motion.

MR. MONTGOMERY: Your Honor, my name is Bruce Montgomery from Washington D.C. I represent the Great Western Sugar Company, and I am speaking on behalf of all defendants and with regard to our motion to dismiss certain of the plaintiffs and to compel further discovery or for sanctions.

As Mr. Raven noted this morning, Your Honor, we have been guided by your comment during the September 26 hearing in New York that the basic issue facing us on the class motion before you is and

4 - 16 1 has been the fact pattern in this particular case. No
2 have been guided in our presentation by that statement.
3 And pursuant to that suggestion and to the Court's
4 pre-hearing orders of No. 2 and No. 4 entered in August
5 and late September, we have attempted as best we could
6 in the briefing schedule that was established, which
7 was a tight one, to obtain the facts pertinent to this
8 fact industry with those enormous diversities of buying
9 patterns through the discovery devices available to
10 the defendants, being interrogatories and depositions.

11 You will remember that in your
12 Order No. 2 and again in your Order 4, you gave the
13 defendants that right. And in Pretrial Order No. 4, you
14 ordered that the plaintiffs should answer these inter-
15 rogatories as to which no objections had been filed by
16 October 17. That constituted a three week extension
17 of time for plaintiffs to file such answers.

18 In addition, pursuant to Pretrial
19 Order 4, defendants attempted to depose a limited number
20 of the plaintiffs' class representatives at various,
21 located in various parts of the United States. As Mr.
22 Raven has also pointed out, however, it has been the
23 plaintiffs' strategy here to ignore the facts about this
24 industry and about their diverse business operations. And
25 consistent with that strategy, it has appeared to the

4 - 17 1 defendants that it has also been the plaintiffs'
2 strategy to substantially frustrate the defendants'
3 ability to obtain the necessary facts to present to
4 Your Honor today.

5 A substantial number of plaintiffs
6 have utterly failed to comply with your Pretrial Order
7 No. 4 and have filed no interrogatory answers whatever.
8 And another group of plaintiffs have provided no
9 answers whatsoever to certain of the interrogatories
10 propounded by the defendants, to which no objections had
11 been filed by those particular plaintiffs. In addition,
12 the plaintiffs objected to approximately half of the
13 interrogatories that were submitted to them. And, of
14 course, no answers have been obtained as to those inter-
15 rogatories.

16 Finally, time and time again and
17 in a substantial number of the depositions that were
18 conducted, plaintiffs' counsel unreasonably instructed
19 the deponents not to answer questions that by any frame of
20 reference were relevant and reasonable questions.

21 Now, our motion to Your Honor,
22 to which I address myself initially suggested that
23 these proceedings be stayed because of the inability
24 that defendants were finding themselves in obtaining
25 those facts to present here. We have withdrawn that

4 - 18 1 portion of our motion. We do not believe the plaintiffs
2 have met their burden of proof, and after all, it is
3 their burden. In an interest of expediting these
4 proceedings and permitting this hearing to proceed today,
5 we have withdrawn our suggestion that the proceedings
6 be stayed. However, we do, we are insistent that at
7 least in two respects our motion be heard.

8 We have continued here, and I
9 argue to you today, Your Honor, that you should dismiss
10 the complaints of these plaintiffs who, at the date
11 our motion to compel was filed, had filed no answers
12 to any interrogatory propounded to them by the defendants.
13 There are about 21 of such plaintiffs. They are listed
14 at the footnote of Page 3 of our memorandum.

15 Since our motion was filed, some
16 plaintiffs have proceeded to file answers to interroga-
17 tories, so that there are presently 9 plaintiffs, instead
18 of the 21 listed in that footnote, to which no interroga-
19 tory answers have ever yet been filed. However, these
20 plaintiffs who filed as late as December 4th, December 5th,
21 it is obvious, that filings that late-- and that is over
22 a month late-- with the scheduled-- briefing schedule
23 well in mind, made it absolutely impossible for the
24 defendants to address the appropriate nature of these
25 plaintiffs' capacity to be class representatives.

4 - 19 1 At the very least, all of these
2 plaintiffs' allegations concerning the certification
3 of classes should be stricken, and none of them should
4 be permitted as class representatives in these actions.
5 They have demonstrated an incapacity to serve as class
6 representatives by their failure, deliberate, calculated
7 failure to respond to our interrogatories. At no time
8 did any of them make a request for an extension of time
9 to answer. They simply flouted and ignored your
10 Pretrial Order 4.

11 We do not now press those portions
12 of our motion which would require Your Honor to address
13 the objections to interrogatories filed by the plaintiffs
14 at this time. Neither do we seek Your Honor's attention
15 at this point to those interrogatory answers that were
16 incomplete. We adopt, and we have accepted, the
17 suggestion contained in the plaintiffs' response to
18 our motion and suggested in the agenda that we schedule
19 a meeting with plaintiffs' committee to discuss future
20 discovery. And we intend to reassert as phase one
21 discovery of defendants, those interrogatories to which
22 we have not yet received answers and those interroga-
23 tories to which plaintiffs have objected, with the
24 elimination of certain interrogatories which are solely
25 directed to the classes. Some of these we will eliminate.

Now, as to the depositions, Your Honor, we have set forth, starting at Page 25 of our motion on the point and running through Page 63, a list of some of the answers, some of the questions put to the deponent, party plaintiffs representing-- alleged class representatives to which various plaintiffs' counsel instructed that the witness give no answer.

We believe that any reading of those questions immediately makes clear that the questions were entirely proper, reasonable and relevant to the issues before you. They concerned the plaintiffs' purchasing patterns of sugar, their selling practices and other topics that are at the very heart of the issues that you have to address. We have all been handicapped by these instructions. The information that those questions might have elicited are not before us.

We obviously-- there is nothing to be gained at this point in seeking that those questions be answered. The issues are before you now. We have had the argument. The other sanction usually available in situations like this is that the Court may order, pursuant to Rule 37 of the Federal Rules and Manual for Complex Litigation, that reasonable attorneys fees and costs be made by those counsel, those parties

who improperly refused to provide discovery as ordered. We would suggest that you consider that alternative in your discretion. We certainly hope that in this complex case, with the multitude of parties, the numbers of witnesses that are going to be deposed in the future, the difficulties in obtaining continuous rulings on questions like this and the number of depositions and the vast discovery programs that are going to be initiated, that this performance by the plaintiffs is not repeated, and that Your Honor do whatever is necessary to see that it does not happen in the future. Thank you.

THE COURT: Would you briefly now enumerate the items on which you are still requesting a ruling from the Court?

MR. MONTGOMERY: Yes, Your Honor. We request that those plaintiffs who failed to comply with your Pretrial Order No. 4 and failed to submit answers to our interrogatories as to which no objections had ever been filed be dismissed, their complaints be dismissed, and at the very least, that the allegations contained in those complaints seeking class certifications be denied and dismissed.

And secondly, we ask that you consider some sanctions appropriate, perhaps submission

4 - 22 1 of the question to a magistrate as to those plaintiffs
2 who improperly and unreasonably instructed deponents
3 not to answer reasonable questions put to them during
4 these limited number of depositions under a very tight
5 time schedule that Your Honor ordered be conducted.

6 THE COURT: Thank you. Mr.
7 Ferguson.

8 MR. FERGUSON: If Your Honor please,
9 Mr. Max Blecher will respond on behalf of the plaintiffs.

10 THE COURT: Very well, Mr. Blecher.

11 MR. BLECHER: Thank you, Your
12 Honor. I am Maxwell Blecher, representing ITT Continental
13 Baking Company and two of its subsidiaries.

14 The bottom line of the plaintiffs'
15 response served, not condoning the failure of nine
16 specific plaintiffs not to answer the interrogatories,
17 derived from the first two pages of the defendants'
18 moving papers, which indicate that the Court, on August
19 the 18th, expressly authorized defendants to conduct,
20 "class action discovery, including both interrogatories
21 and depositions." So the discovery we are talking about
22 here, Your Honor, was directed solely, should have been
23 directed solely to the questions related to the class.

24 Now, the problem that arises with
25 respect to the objections because of the plaintiffs

4 - 23 1 viewing them as a whole said that these interrogatories
2 in material part were not directed to class issues.
3 The defendants agreed to withdraw a number of those.
4 They have now agreed to negotiate the rest, so that
5 the issue about the scope of interrogatories really
6 is moot and really behind us.

7 More significantly, I might
8 suggest to Your Honor that defendants have suffered
9 no prejudice. This morning you heard a long, and we
10 hope, unpersuasive argument, but nonetheless one very
11 well prepared and very well documented by Mr. Raven on
12 behalf of the defendants directed to the opposition
13 of the class certification.

14 Now, this discovery was designed
15 to prepare for that argument because the defendants
16 have withdrawn the part of the motion, as Mr. Montgomery
17 indicates, addressed to continuing the class certifi-
18 cation arguments for lack of preparation. They have
19 conceded that they received enough information from
20 the plaintiffs in the course of the massive interroga-
21 tories which were answered and the depositions which
22 were discussed so that they could make the presentation
23 to you that was made this morning, both in writing and
24 by Mr. Raven orally today.

25 The fact is, Your Honor, to say

4 - 24 1 it simply, this discovery is moot, and we don't condone
2 those plaintiffs seeking to move the case forward, and
3 we know you don't condone, from past litigation, the
4 failure to answer. But we are really talking about
5 nine specific plaintiffs. And given the nature of this
6 discovery, I submit to you that the punishment simply
7 doesn't fit the crime. It is too early in the game
8 for people to bar people's claims on the failure to
9 answer interrogatories addressed to this limited issue.

10 With respect to the depositions,
11 the problems are identical, Your Honor. Here again the
12 discovery was limited to class issues, and lawyers
13 have to call close shots, and lots of lawyers for the
14 plaintiffs thought that the questions transgressed the
15 bounds of appropriate discovery in terms of class certi-
16 fication. And they made instructions not to answer
17 because they thought the discovery related to merit
18 issues. These conflicts are not likely to arise again,
19 when the only discovery left will be merit discovery.
20 And I submit again that the discussion concerning
21 depositions is moot and not likely to arise. And
22 certainly there has been no showing of a contumacious
23 disregard of the rights of discovery on this limited
24 issue that would warrant the Court's imposition of
25 sanctions, and certainly not the sanction of dismissal.

4 - 25 1 So I say to you simply, the
2 bottom line here is that it is much to-do about
3 nothing. This limited discovery has served its purpose.
4 The defendants have ably presented their viewpoint on
5 class, and nine plaintiffs certainly ought to be
6 required to answer and within a reasonable time-- and
7 I suggest thirty days to answer those interrogatories
8 to which no objection was made-- and then join the rest
9 of the group, play catch-up and join the rest of the
10 group in terms of working out an accommodation in
11 respect to the balance of the interrogatories to which
12 objection was made.

13 Thank you.

14 THE COURT: Do you wish to add
15 anything?

16 MR. ARMSTRONG: Just briefly, Your
17 Honor. Mr. Blecher refers to nine. The number of
18 plaintiffs who failed to answer interrogatories is 21.
19 There were some, as I indicated, that filed after our
20 Motion to Compel, and obviously too late to be of any
21 value in these proceedings to date.

22 We certainly are delighted Mr.
23 Blecher notes that we made our record today on the
24 class issue. We did it in spite of the plaintiffs'
25 tactics. And we in no way--

4 - 26 1 THE COURT: I think you should
2 perhaps respond to his contention that the reason the
3 deposition witnesses were instructed not to answer was
4 because of their view that it was not germane to the
5 class action issues which, of course, was the only
6 reason the discovery was authorized.

7 MR. ARMSTRONG: Yes, indeed, Your
8 Honor. And it was very carefully limited to that by
9 the counsel who conducted it. Of course, there is
10 always that defense made when counsel instructs a
11 witness not to answer a question. He asserts he con-
12 sidered it to be unreasonable or outside the scope.
13 I think it is necessary that either Your Honor or a
14 magistrate examine those questions for yourselves and
15 determine whether or not they were reasonable and
16 within the scope of the class issues posed.

17 THE COURT: Are they sufficiently
18 set out here?

19 MR. ARMSTRONG: They are. Each
20 one is set out in those pages between 25 and 63.

21 THE COURT: So I have no need
22 of any further examination excepting what I have here.

23 MR. ARMSTRONG: Exactly. I am
24 confident to leave it to Your Honor to examine those.

25 THE COURT: Do you wish to

4 - 27 1 add anything on the subject in the way of a memorandum
2 to further respond?

3 MR. BLECHER: Only one point
4 on the depositions, Your Honor, and that is that
5 instructions not to answer were given by individual
6 lawyers under the guidelines established by a
7 committee of plaintiffs' lawyers. And I think it
8 would be unfair to penalize any specific plaintiff
9 for asserting objections that were essentially agreed
10 upon by joint action. I don't think there is a
11 contumacious purpose here.

12 THE COURT: I intend to act
13 expeditiously on these matters, but if you wish to add
14 anything to what you have put in your papers on the
15 subject or in your argument, I will be glad to allow
16 you to do that.

17 MR. BLECHER: No, sir.

18 THE COURT: Very well, the
19 matter is submitted.

20 MR. BLECHER: There is one other
21 problem, Your Honor, on this subject matter not
22 related to the motion. Some new plaintiffs have come
23 in, and they are getting these interrogatories as
24 they come in. And we would like to give these people
25 until February 1, given the holiday season, to put

4 - 23 1 some answers together. Is that agreeable?

2 MR. ARMSTRONG: It is. I think
3 it might be a subject to be discussed along with the
4 other topics that we are going to be talking about.

5 THE COURT: Let's leave it
6 this way, that that will be approved subject to what-
7 ever both of you may suggest with respect of it. Is
8 that satisfactory?

9 MR. ARMSTRONG: Yes, it is, Your
10 Honor.

11 THE COURT: Put it in an order
12 form.

13 MR. FIRTH: Fred Firth. May I
14 say one sentence on this subject? I have been so quiet
15 all day.

16 THE COURT: Yes.

17 MR. FIRTH: My name is Fred
18 Firth, and I represent Mother's Cookies and Eng-Skell
19 Company. The plaintiffs counsel, as Mr. Blecher
20 points out, all got together and tried to decide on
21 certain guidelines for these depositions from our
22 point of view. Thereafter, during the course of the
23 depositions, the instructions of the committee were
24 followed, which seemed to me harsh, indeed, for one
25 plaintiff to suffer following the instructions of the

4 - 29 1 plaintiffs committee. That was four, Your Honor.

2 MR. RAVEN: Your Honor, may I
3 add a point on that?

4 THE COURT: Yes.

5 MR. RAVEN: My associate took
6 three depositions and asked the same question. And in
7 one of them they answered them and in two they did not.
8 Now, either the one misunderstood the instructions or
9 the other two did. But we would like to have that
10 considered.

11 (Off the record)

12 MR. BLECHER: Your Honor, my
13 colleagues advise me that our brief did not address
14 the subject of depositions because we had thought that
15 that subject would not be raised with Your Honor. May
16 we have ten days to address that subject?

17 THE COURT: Well, make it very
18 short. I want to act expeditiously.

19 MR. BLECHER: Seven days.

20 THE COURT: Yes, done. The next
21 matter is the Motion to Dismiss or strike all the counter-
22 claims.

23 MR. FERGUSON: Yes, Your Honor.

24 Mr. Perry Goldberg will speak on behalf of the plaintiffs
25 in that matter.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Perry Goldberg

speaking on behalf of plaintiffs Motion to Dismiss and strike certain counterclaims filed by the defendants. Your Honor, I have neither the eloquence of the previous speakers or the virtue of Mr. Cochran, but I will attempt to be brief this afternoon.

I would like to stress three cases which were cited in our brief, and basically that will be my argument today. First of these cases is the Rosenberg, which I believe stands for a very simple proposition that we all have to recognize that life is short and cases must be held to a malleable framework. And one antitrust case in this situation is quite enough. And surely we don't need twenty additional antitrust claims going from coast to coast as these counterclaims would present in the situation.

For example, there are counterclaims alleging price fixing conspiracy among bakers in the New York area. I really don't understand how that gets into this case. There are counterclaims alleging price fixing among bakers in Chicago. The next that I knew of in Chicago was a price fix allegation which the Federal Government brought in French bread. Now that gets to the entire baking

industry escapes my imagination. There are a lot of counterclaims. In fact, I counted them up today. There is a useful appendix in defendants brief on this subject which lists twenty separate antitrust actions in the food industry on which they are basing counterclaims. I believe, Your Honor, that is just too much here.

The other cases to which I would like to address myself are the Denson Stores case and the Serna case. Both of these cases stand for the proposition that counterclaims cannot be filed against absent class members. Filing a counterclaim against such an absent class member would in effect make the absent class member a party to the litigation and would vitiate the very purpose of Rule 23. In other words, Rule 23 would become nothing more than a joinder device. And that is what the court in Denson Stores held.

And in Serna the Court even went further. It said, not only can't you file the usual type counterclaims, but you can't even file a counterclaim for monies due and owing based on the same reasoning. Nothing in the defendants' brief, as I read it, attacks these holdings. Rather the brief discusses generally cases in which the issue was class certification and in which the Court was looking for

1 a means of not certifying classes and used the fact
2 that counterclaims were possible in the situation to
3 avoid certification.

4 And that is precisely what
5 we believe these defendants are seeking to do by
6 means of these counterclaims here. Certainly, a
7 motion to strike counterclaims or a motion to strike
8 pleadings or anything on the grounds that they are
9 not brought in good faith is not to be lightly brought.
10 And we did not bring these motions lightly, Your
11 Honor. We brought them quite sincerely, believing
12 that when you have 1600 allegations of counterclaims,
13 their very mass shows that they are not brought with
14 sincerity.

15 If the defendants had chosen
16 the stiletto instead of the meat ax in this situation,
17 perhaps we would have certainly not filed these types
18 of motions against them.

19 Finally, I want to deal with
20 the counterclaims against name parties. Counterclaims
21 would usually be fileable against named parties, and
22 we have no dispute with that. But in this situation
23 the counterclaims are merely Potemkin villages. They
24 are cardboard counterclaims that can't even stand a
25 casual look behind them. Let's for a moment go behind

1 the fabrications and examine how they are attempting
2 to be justified by the defendants in their brief.
3 The defendants claim that first, for example, brokers,
4 independent brokers or general brokers, as they termed
5 them, are in constant communications with the sellers
6 and the buyers. Through these communications,
7 allegedly false and misleading information was supposedly
8 fed to the refiners in a conspiracy to drive down
9 prices. The defendants were kind enough, however, to
10 include in their brief and affidavit which very
11 generously pointed out that the brokers are paid by
12 the refiners, in effect, by the defendants. So here
13 we have a conspiracy, allegedly a longstanding con-
14 spiracy by the brokers to reduce their own fees and
15 therefore their own incomes.

16 This Court, just because the
17 case is designated an antitrust case, need not ignore
18 the obvious economic reality that even a dog will not
19 bite the hand that feeds him. The only cases which
20 involve conspiracy to reduce prices are those with the
21 intent of driving a competitor out of business. None
22 of the defendants alleged that they were driven out
23 of business, and none of the defendants appear here
24 today anything but flourishing with the profits that
25 they have amassed in recent years.

Secondly, this Court might look very carefully at the counterclaims which are based on communications which do not appear to have changed since the foundation of the sugar industry itself. There appear to have always been independent or general brokers. There seem to have always been communications between the brokers and the thousands of customers. And now for the first time the defendants have some inkling that all of these years those brokers and those customers were conspiring to drive down sugar prices. It is amazing, at least to us, that not one of these brokers would have stepped forward in one of these years and said, "My God, there is a conspiracy derived on my commissions, and I will not stand for it." No, the broker counterclaims are complete fabrications and are subject to being stricken, even against the named parties on that basis.

The end product counterclaims to which I alluded in my opening statement are even more fanciful than the broker counterclaims. The end product counterclaims rely on the existence of alleged anti-competitive activity in the food industry. The basis for these allegations seems to be FTC, Justice Department and private suits from 1971 to the present time. It should amaze anyone, I think, that none of

these defendants since 1971, a period of four years, when the first of these suits was public knowledge, was able to discern an impact on his own business. None of these defendants, as soon as these indictments or suits or investigations was launched, immediately filed suit. If there had been a drastic impairment of the defendants' competitive positions or their economic positions as they now allege, and which in our view would be needed to sustain these counterclaims in view of the Rosemont case, we would have seen them in Court long, long before the plaintiffs filed suit based on the indictments last year.

We point out, although we are not discussing standing this afternoon, that in order for the conspiracies alleged by defendants' counterclaims to have had any effect on these defendants, they would have had to have traveled between four and eight levels of distribution. Certainly, there could be an argument on standing, but because we are plaintiffs, we thought it better not to raise these normal defenses to this type of counterclaim.

The third type of counterclaim is simply for unpaid accounts. And it should equally amaze all of us that these long overdue accounts were never pressed in state court before now. In fact, the

1 MR. OUTCAULT: If it please the
2 Court, R. F. Outcault, representing Amalgamated Sugar
3 Company and speaking in response, on behalf of all of the
4 counterclaiming defendants. And I might note in this
5 connection that American Crystal did not file counterclaims
6 and its name was placed on this answering brief by inad-
7 vertence.

8 I would like to point out at the outset, Your Honor,
9 something that is briefly stated at the very beginning of
10 our brief and that I will ask the Court to look to when
11 considering our motion; and that is that contrary to the
12 statements in the plaintiffs' papers that would indicate
13 that there is an enormous number of diverse counterclaims,
14 the defendants' counterclaims fall into three general
15 categories.

16 THE COURT: Are you reading? From
17 what page?

18 MR. OUTCAULT: I am not, Your Honor.
19 This material is related earlier on in our brief.

20 THE COURT: Very well.

21 MR. OUTCAULT: The first general
22 category is that counterclaim which alleges that plaintiffs
23 and class members who have utilized the services of general
24 brokers in purchasing sugar from defendants have used those
25 general brokers to conspire, in violation of the Sherman Act,

1 to induce unwarranted price concessions or to reduce the
2 price of sugar. The counterclaim is well pleaded, and it
3 states a cause of action.

4 THE COURT: Are any of these counter-
5 claims compulsory?

6 MR. OUTCAULT: In our view, Your
7 Honor, many if not most of the counterclaims would be
8 compulsory, and I intend to --

9 THE COURT: Do you designate in your
10 memorandum which ones are?

11 MR. OUTCAULT: We do not. In this
12 first group are also counterclaims which relate to the
13 use of general brokers by plaintiffs or class members
14 through false representations in a matter that amounted
15 to common law fraud. Also in this general category I
16 include two (f) counterclaims under the Robinson-Patman
17 Act. All of these, or at least certainly the two (f) claims
18 are a type of counterclaim often seen in anti-trust actions.
19 The second group of counterclaims relates to money due and
20 owing from plaintiffs or class members to defendants. And
21 contrary to the argument made here by the plaintiffs this
22 certainly is not unusual when a defendant is sued that he
23 comes forward with such claims as he may have against the
24 plaintiffs, particularly in those instances where money is
25 due and owing and the counterclaim probably is compulsory.

1 Thirdly, the money is due and owing on sugar purchases
2 which arise out of the transactions here in issue.

3 Finally, the plaintiffs have alleged a series of
4 what we have referred to as end product claims, which
5 amount to claims that the plaintiffs or class members in
6 connection with their own sale of sugar containing products
7 conspired to restrain trade in violation of the Sherman
8 Act and thus reduced the demand for sugar and the prices
9 to be obtained by the defendants for their product.

10 As an additional claim relating to this category
11 are certain counterclaims alleging that plaintiffs and
12 class members conspired to substitute non-sugar sweeteners
13 for sugar, thereby reducing the demand for sugar and
14 injuring the defendants. No where have the plaintiffs even
15 attacked this particular counterclaim, and we assure that
16 they take it as a valid one.

17 Generally speaking, there are three types, depending
18 on how they are classified, of counterclaims in all some
19 29 different counterclaims. Of course, in responding to
20 50 or more separate actions, these counterclaims had to
21 be restated many times, and so you can develop a rather
22 large number in terms of counting the claims. But there
23 are, as I say, 29 different counterclaims, something over
24 20 are the end use, end product claims. No defendant
25 brought all 29 claims. One defendant brought none.

1 As the Great Western memorandum, which is supplemental
2 to the defendants' memo that I am arguing has indicated,
3 Great Western filed five of these different counterclaims
4 in a number of actions, of course, of three different types.
5 My own client, Amalgamated, filed seven different types,
6 different counterclaims, of course, in a series, in the
7 course of answering the many complaints. So there has not
8 been a shotgun approach here in spite of the fact that it
9 does require the filing of many counterclaims to add to
10 the answers in the numerous complaints.

11 Now, really the plaintiffs have made only one
12 principal argument here, and that is the question raised
13 by the Dorson and Serra cases as to whether or not absent
14 class members can be -- whether counterclaims may be
15 interposed against absent class members. But before I
16 reach that point, I would like to simply note again that
17 the counterclaims, the separate counterclaims, are not
18 large in number, and many of them refer to the named
19 plaintiffs. So that even in connection with the plaintiffs'
20 principal point that the counterclaims are against absent
21 class members, many of these counterclaims certainly would
22 withstand this motion, being against named plaintiffs.

23 Now, the plaintiffs' principal point, as indicated
24 in their brief, is simply that under Rule 13, absent class
25 members shouldn't be treated as parties, and consequently,

1 the counterclaims should be dismissed, all of the counter-
 2 claims. In that regard, their brief doesn't distinguish
 3 between counterclaims against named plaintiffs and absent
 4 class members. I would like to suggest that this issue
 5 can't be decided on any mechanical basis under Rule 13.
 6 The issue is one which requires the Court to consider the
 7 purpose of counterclaims and the purpose of Rule 13 and
 8 whether or not absent class members should be treated as
 9 parties for whatever purpose might be in issue.

10 For example, in Weld v. Missouri Pacific Railroad --
 11 this is a case that isn't in our paper -- 64 Federal Rules
 12 Decisions 346, in indicating the extent to which a Court
 13 in connection with settlement negotiations in a class
 14 manner must guard the interest of its absent plaintiffs,
 15 the Court even referred to absent class members as absent
 16 parties, indicating, and I quote

17 "In general, the Court has the
 18 judicial responsibility of
 19 acting as guardian of the
 20 absent parties as well as those
 21 present before the Court."

22 Now, I don't lay any great stress on the use of the
 23 phrase "absent parties" as suggesting a rule of law. The
 24 Court there decided. The point is that in that context
 25 the Court had to consider, similar to parties present

1 before the Court, the interests of the absent plaintiffs.

2 THE COURT: It may have been a typo-
 3 graphical error.

4 MR. CUTCAULT: Well, it is possible
 5 that it was inadvertent on the part of the Court in referring
 6 to them as parties. Nevertheless, the substance is that
 7 their interests are to be considered.

8 In another case which is cited in the plaintiffs'
 9 papers, Brennan v. Midwestern United Life Insurance Company,
 10 certain absent class members had failed to respond to
 11 discovery which was required of them. The trial court in
 12 that case dismissed the claims of the absent class members
 13 with prejudice, and that ruling was sustained on appeal.

14 Now, the plaintiffs would characterize in their
 15 pleadings as simply interested bystanders these absent
 16 plaintiffs. The fact of the matter is in that case, they
 17 were required to take some affirmative action on pain of
 18 having a judgment entered against them that barred further
 19 claims.

20 Now, that is the case that plaintiffs cite for the
 21 fact that Judge Stephens, who is currently appearing before
 22 the Senate, dissented and noted that the absent class
 23 members were not parties. But even Judge Stephens objections
 24 was that they hadn't been adequately represented. There
 25 was no one protecting their interests before the Court.

1 Well, he lost his argument with his brethren on that case.
 2 He, of course, may have the opportunity to reverse them.
 3 But that case nevertheless, stands as a clear cut decision
 4 that absent class members were treated for that purpose as
 5 parties.

6 Now, briefly, I would like to point out to the
 7 Court that in a number of decisions which are cited in our
 8 brief -- and I won't belabor the point -- in class cases
 9 District Courts have simply taken as fact that counterclaims
 10 against absent class members were before the Court, and
 11 they have done this in the context of determining whether
 12 those counterclaims had bearing on the issue of certification
 13 of a class. The plaintiffs characterize those cases as
 14 simply mentioning the counterclaims in passing, but I will
 15 just read from the Rodriguez case, which is cited in our
 16 brief, where the court noted that the counterclaims by
 17 defendant for non-payment of amounts due under the contracts,
 18 which would be compulsory counterclaims under 13(a), would
 19 raise further difficulties, including possible defenses
 20 such as the fraud defense raised in plaintiffs' reply.
 21 Questions affecting only individual members therefore
 22 predominate over questions common to members of the class.

23 That decision is typical of a number that take it
 24 to be true that the defendants' counterclaims are before
 25 the Court even though they do not specifically raise the

1 issue on a motion to strike.

2 Now, the cases that the plaintiffs principally
 3 rely on, the Parson and the Loma cases, did treat that
 4 question specifically as to whether a motion, whether a
 5 counterclaim against absent class members would withstand
 6 the motion to strike, and the Court in those two cases
 7 indicated that they felt that the absent class members were
 8 not parties and that the counterclaims would have to be
 9 amended to name specific plaintiffs.

10 I would like to suggest to Your Honor that Rule 13
 11 did not require the rulings that were made in those cases,
 12 that they should not be followed here. Both of those
 13 decisions, while requiring the amendment of the counterclaims
 14 to limit them to named class members, made it clear that
 15 the potential counterclaims which were thus eliminated
 16 simply from the pleadings would be described in the notice
 17 which went out to the class members. That is to say, that
 18 they were not out of the case. Both courts went on to say
 19 that in the event a class was certified as the plaintiffs'
 20 instance, and if liability were found against defendants,
 21 then the counterclaims would be taken up with damage
 22 questions at a later time on a class member by class member
 23 basis.

24 Now, I submit, Your Honor, that as a matter of
 25 sound judicial administration, this seems wrong in most

1 cases. I submit that it would be particularly unwise in
2 these cases.

3 In the first place, we have additional complaints
4 coming in weekly, if not daily. Consequently, additional
5 counterclaims will be filed against named plaintiffs, as
6 the plaintiffs' brief virtually concedes are proper. And
7 I think that point was conceded in oral argument. But
8 further, it would mean that the case would go forward
9 through pre-trial proceedings, discovery, the narrowing
10 of issues, all that goes into the pre-trial, apparently
11 under these rulings, down through the question of liability.
12 And if that is found, then discovery on the counterclaims,
13 pre-trial on the counterclaims, and all that goes with
14 that, would apparently be re-opened under this manner of
15 proceeding.

16 Now, in a case that involves the number of claims
17 that the plaintiffs have brought in this case, it certainly
18 seems to me that that is an unwise procedure, and that the
19 counterclaims, all of them, should go forward concurrently
20 with the balance of the case.

21 Now, I would like briefly to point out -- and this
22 is covered in our paper, and so I would rather not belabor
23 the point -- that these counterclaims not only are well
24 pleaded but are far from specious, and they do relate to
25 the issues that are raised by the plaintiffs' pleadings.

1 And I ask Your Honor to refer to our papers and to read
2 the supporting affidavit attached to our brief which
3 details, for example, the basis of the counterclaims regard-
4 ing the plaintiffs' use of general brokers. This is the
5 subject of litigation in a case in the east, which is
6 detailed in our papers. And in that case and in our
7 affidavit is clearly pointed out that the plaintiffs, among
8 their other allegations against the defendants here, charge
9 that the defendants made use of sugar brokers as a means
10 of conspiring to increase or fix the price of sugar.

11 Certainly, if the defendants are charging as they
12 are here that in fact the plaintiffs were able to use
13 general brokers to depress the price of sugar, that is an
14 issue that arises directly in connection with the facts
15 and the issues of the case that the plaintiffs have already
16 brought. And so far as the contention that the claim is
17 specious because the plaintiffs argue that the general
18 brokers, in effect, would be biting the hand that feeds
19 them, the facts are just otherwise, and the affidavit that
20 is attached to our pleading, I think, fairly indicates
21 that. As I understand it, general brokers are paid on the
22 100 weight they sell, not the price. And the fact of the
23 matter is that any middleman usually likes to get the
24 price down because it increases the number of transactions
25 they can make.

1 In any event, the counterclaim is well pleaded. It
2 is supported by the attached affidavit, and it is a real
3 counterclaim, and it is one that should be handled in the
4 course of discovery through the merits of this case.

5 We feel that the same thing is true of our end
6 product counterclaims. We have attached a schedule to
7 our pleading indicating the various indictments, criminal
8 and civil actions, on which these counterclaims have been
9 based. Those actions charging price fixing, conspiracies
10 and other restraints by certain categories of sugar users
11 in various parts of the country.

12 Certainly, in these cases the plaintiffs are urging
13 that the defendants have used various means to affect the
14 price of sugar. If the conspiracies charged in these
15 other cases also reduced the demand for sugar and affected
16 the price of sugar, we think that we are entitled to bring
17 those counterclaims and have them heard in connection with
18 the course of administering this action.

19 There is another point I wanted to make, but it
20 escapes me. So in concluding, I would like simply to
21 point out that in this case, perhaps peculiarly, although
22 I am not sure of that, with new cases coming along constantly,
23 many of these individual plaintiff cases, not class cases,
24 there are bound to be more counterclaims as we go along
25 against named plaintiffs. There is peculiarly a reason

1 not to follow the Borden and Gran rulings. The counter-
2 claims, as I have indicated, we feel, are well pleaded. We
3 think that will appear from our papers, and they should
4 stand. And we think that this case will be better administered
5 if they do.

6 THE COURT: Thank you.

7 MR. OUTCAULT: Thank you, Your Honor.

8 MR. GOLDBERG: May I reply for a
9 moment, Your Honor? Perry Goldberg for the plaintiffs.

10 The Court asked eminent counsel on the other side
11 for his viewpoint on whether these counterclaims are
12 compulsory or not. And I thought perhaps that we might
13 respond by citing to the Court the Gran case, which is
14 in our brief, in which in effect it was held that none
15 of these counterclaims are compulsory against absent
16 class members. I believe that is the only way the holding
17 in the Gran case could have ever been justified because
18 what the counterclaims that were stricken there were counter-
19 claims for money due and owing, which are clearly the most
20 compulsory type of counterclaims known. And in the circum-
21 stances, what the court was doing was saying that until the
22 absent class members have made a recovery in the litigation,
23 until that point in time, they are not parties to the
24 litigation. And this is just what we are saying here today.
25 They are not parties. Otherwise Rule 23 is a joke

1 device.

2 With respect to the counterclaims filed against
3 named parties, I think they have been filed haphazardly,
4 and there has been no affidavit filed by those defense
5 counsel that they were filed in good faith to counterclaim
6 our contention that they were not. I believe that would
7 have been a proper course and would perhaps in most instances
8 have eliminated the necessity for our pursuing this action
9 with respect to named parties.

10 However, we don't have that, Your Honor. They
11 haven't chosen to buttress their position with such
12 affidavits. And in the absence of such affidavits and
13 with the entire surroundings of these counterclaims, 1,000
14 in number, I think there is a presumption that they were
15 not filed in good faith.

16 MR. HANBERG: May I be heard briefly?
17 I speak for an individual, non-class action, that has been
18 counterclaimed. It would take me about two minutes. I
19 have a special problem.

20 THE COURT: All right.

21 MR. HANBERG: Your Honor, I am
22 Jerome A. Hanberg of Haley and Scott in Washington, D. C.,
23 and I represent eight named plaintiffs in the non-class
24 action, London Tea Company, et al. versus Great Western
25 Tea Company, et al., C 75 1267 GWS. I filed a supplemental

1 memorandum to outline my concern, and I just wanted to
2 briefly mention it here. We were served with counterclaims
3 by C & W in which they did not name who they were counter-
4 claiming against. Bear in mind, this is a non-class action,
5 eight named plaintiffs. C & W chose to counterclaim in
6 the following manner. This counterclaim is brought against
7 these plaintiffs who have purchased refined sugar from
8 counterclaimant and have provided counterclaimant, either
9 directly or indirectly, with false and misleading informa-
10 tion as to competing bids at lower prices.

11 Now, Your Honor, there is one example of a dilemma.
12 No one is named as a counterclaimed defendant. If we are
13 to reply to that counterclaim to protect our affirmative
14 defenses, we are in effect admitting fraud. The only
15 defendants, according to this counterclaim, are those that
16 committed fraud. No names. I know this pleading is pretty
17 liberal, but I still think you have to name who you are
18 suing when you don't have class action. Similarly, in
19 another counterclaim, C & W charged all those counterclaimed
20 defendants who utilized the services of general brokers.
21 No description of what that means, no idea of what kind of
22 utilization, using the phone once, negotiating with some
23 on a regular continuing basis, no way of knowing who is
24 being named as a counterclaimed defendant.

25 Certainly, Your Honor, Great Western filed a counter-

1 claim only against one of my clients, National Tea Company.
 2 They then proceeded in the course of describing the
 3 counterclaim, and in Paragraph 43, I quote

4 "Counterclaimed defendants acting
 5 in concert and aiding and abetting
 6 each other, used general brokers
 7 as conduits."

8 Well, I have not yet seen how one party can engage
 9 in a conspiracy with itself. So, Your Honor, these are
 10 illustrations of what I think Mr. Goldberg has well
 11 established, that these are made in bad faith. Secondly,
 12 with respect to my clients, it leaves us on the horns of
 13 a great dilemma, unless Your Honor strikes all the counter-
 14 claims.

15 If Your Honor doesn't do that, we request that you
 16 strike the counterclaims that I have just mentioned because
 17 we have no way of knowing who is being sued, and unless
 18 we are told who is being sued, we either waive our defenses
 19 by a failure to reply or confess fraud by replying. Thank
 20 you.

21 (Off the record)

22 MR. ALBANI: Your Honor, may I vary,
 23 very briefly reply on behalf of U & I, Inc.?

24 THE COURT: Yes.

25 MR. KIRSHEN: Your Honor, I think

1 Mr. Goldberg suggested that some affidavit was appropriate,
 2 but I think Rule 11 covers this. And my signature on those
 3 answers and counterclaims on behalf of U & I, attest to
 4 my good faith in bringing those actions. And, in effect,
 5 in a way, we are embarrassed by riches in approaching the
 6 class action argument. And I think it is well spelled out
 7 in the brief and supplement by Mr. Raven, there are no
 8 many reasons why, we submit and I won't re-argue, that this
 9 cannot proceed as a class action, that certainly we didn't
 10 need any question about counterclaims. All the problem
 11 about counterclaims, and be they compulsory, be they not,
 12 and without regard to how we as defense counsel think that
 13 the issues here should be tried -- which I think certainly
 14 on an individual issue by individual issue basis, we see
 15 plaintiffs constructing economic models and addressing
 16 industry in the tainting of industry and the tainting of
 17 the market as such. And certainly, if that is to be
 18 addressed, we should see what are the anti-trust implica-
 19 tions of any market. And that is certainly reasonable
 20 enough, when we, the sugar companies in the marketing, are
 21 called into question that in good faith in responding to
 22 other actions by the government, that we asked that all
 23 those matters be put before the Court and examined. It is
 24 not a matter of bad faith, and I think that again I think
 25 I might want to join with Mr. Mohr saying that there is no

1 need to add to all of our problems any catcalling back and
 2 forth. And certainly counsel in good faith can see things
 3 differently. And I don't fault plaintiffs for addressing
 4 this motion, which we think should be denied. But I don't
 5 fault him for addressing it. But to impugn across the
 6 board the good faith of counsel on either side, I think
 7 doesn't advance this litigation and certainly brought on
 8 behalf of U & I, and I think on behalf of all the
 9 defendants, that this matter was very carefully considered,
 10 and we brought them in complete good faith.

11 MR. OUTCULT: Your Honor, Mr. Kirkham
 12 has made the one point that I did want to make in rejoinder.
 13 I am sure he does speak for all of the counterclaiming
 14 defendants and their attorneys, that we felt, as the rule
 15 provides, our signatures on the counterclaims indicated their
 16 good faith. And I didn't want you to infer from the fact
 17 that we haven't filed an affidavit in support of our
 18 responsive pleadings to the motion that there would be
 19 any call whatever, as the plaintiffs suggest, to require
 20 some further affidavit of good faith as to the filing of
 21 the counterclaims.

22 I think Mr. Kirkham well spoke for all of the
 23 defendants on that. Thank you, Your Honor.

24 THE COURT: I can only make this
 25 comment about the matter of good faith of counsel: I

1 have high regard for our profession and the vast majority
 2 of the counsel who practice as advocates. I emphasize
 3 the word "advocates" because my acquaintance with lawyers
 4 is largely that of advocates. I have been a trial lawyer
 5 and a trial judge now for almost 50 years, and it has been
 6 demonstrated to me many, many times that the ethical, good
 7 faith standards of lawyers are so high and observed so
 8 well that those whom malign us should take a few lessons
 9 from the way lawyers regard their obligations.

10 It is true that there are occasional lawyers who
 11 wander from the path. And it is our business to do what
 12 we can to preclude that.

13 I have so high a regard for the integrity and
 14 responsibility of lawyers that you have to make a very
 15 strong showing to convince me that there was a lack of
 16 good faith.

17 This does not suggest, however, that lawyers do not
 18 err in judgment in what they say and do. And for my part,
 19 this is merely a part of the business of all of us because
 20 I err in judgment not infrequently, and therefore, I am
 21 as vulnerable as anyone else on that score.

22 The matter is submitted. I would like you to indicate,
 23 if you wouldn't mind in the next few days, which one of your
 24 counterclaims you contend are compulsory. I think there
 25 is a distinction between compulsory counterclaims and those

1 which are not. And I think it would be helpful to have
2 that information. Whether I act on it or not after I have
3 read the memoranda and study the matter is another thing.
4 But please do that.

5 MR. CUTCHULET: We will be glad to
6 submit that.

7 THE COURT: It wouldn't be difficult
8 to do. You don't have to mention all of them, just which
9 particular type of counterclaim you say is compulsory. And
10 if you want to take a few minutes more and put a citation
11 supporting your view, that is no such the better. You
12 don't have to do that. I can do it myself.

13 MR. CUTCHULET: We will be glad to
14 do that.

15 THE COURT: Thank you very much.
16 Would you do that by the same time that Mr. Blitzer was
17 given?

18 MR. CUTCHULET: A week?

19 THE COURT: The seven day period
20 would be applicable in that case, too. Thank you very
21 much.

22 MR. FLEMING: Your Honor, may I
23 report to the Court that we are 10 minutes ahead of time,
24 and I would like to suggest a 10 minute recess for good
25 behavior.

1 THE COURT: I wish you hadn't suggested
2 it, because you just have preempted us from suggesting the
3 same thing. All right, we will recess for about 10 minutes
4 until 2:15.

5 (Recess)

6 THE COURT: Item 5, defendant's motion
7 to strike fraudulent concealment.

8 MR. KIRKMAN: Thank you, Your Honor.
9 James F. Kirkman. I represent S & I, Inc., formerly Utah-
10 Idaho Sugar Company. I am making this argument on behalf
11 of all defendants.

12 (Off the record)

13 MR. KIRKMAN: For the record, the
14 question, this particular question before the Court is a
15 narrow one but an important one, and that is have plaintiffs
16 properly pleaded fraudulent concealment under Rule 9(b) of
17 the Federal Rules of Civil Procedure. Plaintiffs, in
18 response to our motion, argued that 9(b) does not apply
19 either in anti-trust cases or at least to the pleading of
20 fraudulent concealment as distinguished from fraud, although
21 I think that fraud is in fact the whole basis behind
22 fraudulent concealment.

23 But in any event, citing that aside, the rule
24 applicable here, I think, was succinctly stated by Chief
25 Judge Harris in Lucky Breweries v. Guen, Illinois, Inc.,

1 and that order is Exhibit A to defendants' motion with
2 respect to the fraudulent concealment allegations in the
3 1912 case.

4 That was filed in October 30, 1973. In that case,
5 in that order -- and I read from it, just as I think
6 Judge Harris very succinctly states the law even better
7 than I could -- quote

8 "Plaintiff has attempted. . ."

9 I am reading now

10 "Plaintiff has attempted to
11 assert claims arising more
12 than four years prior to the
13 date of filing of suit by a
14 contention that the defendants
15 fraudulently concealed such
16 causes of action. Plaintiff's
17 complaint makes the following
18 lone reference to such fraudulent
19 concealment."

20 Here the Judge sets out the pleading. Continuing
21 the quote,

22 "Defendants have fraudulently
23 concealed the existence of the
24 aforesaid combination and
25 conspiracy by the use of devices,

1 the purpose and effect of which
2 has been to prevent knowledge
3 of the existence of the aforesaid
4 combination and conspiracy by
5 persons, including plaintiffs,
6 non-parties thereto."

7 That is in Judge Harris' quote on the pleadings, and
8 then continuing with Judge Harris' order,

9 "By such pleading, plaintiff seeks
10 to take advantage of the rule that
11 fraudulent concealment of the
12 existence of a cause of action
13 will toll the applicable statute
14 of limitations. . ."

15 And a citation, quote

16 "Which rule has been held applicable
17 to causes of action under the
18 federal anti-trust laws."

19 Judge Harris goes on to say,

20 "However, the problem is that
21 the conclusory language of
22 plaintiff's pleading does not
23 satisfy the requirements of
24 Rule 9(b) of the Federal Rules
25 of Civil Procedure. Under

1 Rule 9(b), all averments of
2 fraud must state the circumstances
3 constituting the same with
4 particularity. Allegations of
5 fraudulent concealment fall within
6 Rule 9(b)."

7 I think that is the statement of the law, and then
8 how does it apply here is our next question. Judge Harris,
9 in that case, said all right, the fraudulent concealment
10 allegation is sufficient. I will treat this as a motion
11 for more definite statement and grant that motion.

12 Now, here, under the facts here present, such a
13 strategy, I submit, would be an idle one. In fact,
14 plaintiffs do not suggest it. The practical reason is
15 apparent. The example is the 1912 case, where we went
16 through the full drill. We moved to strike, we moved for
17 a more definite statement, and while that motion was under
18 submission, defendants propounded interrogatories and asked
19 for production, requested production of documents based
20 upon, what do you base the allegations of fraudulent
21 concealment, what are the facts and what documents show it,
22 et cetera, et cetera.

23 Again, plaintiffs in those cases objected to answer-
24 ing the interrogatories and declined the request for
25 documents on various grounds, but including the ground
that this allegation, -- the discovery was addressed to

1 contentions, and thus was premature until after the end
2 of all the discovery. The point is that as of now, the
3 plaintiffs who have had no specific basis there, as a
4 practical matter, nor any here, for their claims of fraudu-
5 lent concealment. And, of course, the plaintiffs in those
6 present actions arising out of the government action filed
7 these complaints after that motion was made in the 1912 case.
8 And indeed, further, additional complaints have been filed
9 herein after the very motion that I am arguing here was
10 filed. This motion to strike was filed on October 10, 1975,
11 Your Honor, and on November 25, a month later, American
12 Bakeries filed its complaint represented by Mr. William
13 Dwyer, among others, in which fraudulent concealment was
14 alleged as follows. In the complaint, it is Paragraph 16-1.

15 "Defendants and co-conspirators

16 . . ."

17 And I am now reading,

18 "Defendants and co-conspirators,
19 through various devices and
20 techniques, fraudulently
21 concealed the existence of the
22 unlawful combination, conspiracy,
23 and two, plaintiff had no knowledge
24 of such unlawful conduct or of
25 facts which might have led to

1 the discovery thereof with the
2 exercise of due diligence until
3 December 19, 1974."

4 That was the date of the indictments. If prudent
5 and able counsel could have pleaded more than mere conclusions,
6 they certainly would have, being alert to all that has
7 been our position, put before you.

8 I think plaintiffs, recognizing this, assert that
9 conspiracies are self-concealing, and that when you take
10 the fraudulent concealment allegation in a conclusory
11 form and tack it on to various allegations that you have
12 a conspiracy, then -- and here they say, well, you can
13 flush out the conspiracy with the government bills of
14 particular or whatever prior pleading went into the
15 complaint. Then defendants have adequate notice of
16 plaintiffs' claim in chief, and therefore the fraudulent
17 concealment pleading is sufficient. And I think this is
18 the guts of the matter. Can you, in fact, plead the
19 fraudulent concealment in a conclusory manner, or in the
20 same kind of manner that you can plead the violation in
21 chief.

22 Now, perhaps as a matter of courtesy, I could just
23 simply stop by referring back to what Judge Harris said.
24 But I think there are compelling reasons and common sense
25 why there is a different rule, why under Rule 9(b),

1 fraudulent concealment, the common sense reason behind
2 the rule here that there must be specific pleading of
3 fraudulent concealment, and that conclusory allegations,
4 such as the ones we have here, are insufficient, first,
5 and perhaps least in contrast to what specific acts of
6 concealment and what specific acts of due diligence and
7 all the rest plaintiffs may have in mind.

8 When they do file a claim in chief, there is
9 generally, as there was in the case at bar, a complex of
10 facts that is well known to both sides arising out of a
11 government complaint, whatever it is, and to start pleading
12 the bills of particular or whatever would really be an
13 idle act and then imposition, a practical imposition on the
14 pleading process. You do have, in fact, notice of the
15 various areas that plaintiffs asked you to defend.

16 But second, and more importantly, while liberal
17 pleading of the violation in chief -- as is very often
18 noted -- advances a specific policy of the anti-trust laws,
19 which is their enforcement, and of course the inter rerum
20 effect of potentially bankrupting litigation, as plaintiffs
21 remind us from time to time such as the case at bar. But
22 fraudulent concealment seeks to contravene and to set aside
23 a specific articulated policy of the anti-trust laws under
24 Section XV(b), which was adopted by Congress in 1955. And
25 that specific policy of the anti-trust law is that state

1 claims, after four years, are barred. So while they have
2 the momentum of the policy of the law going for them when
3 they plead in broad brush in a conclusory manner the
4 violations in chief, they seek specifically to set aside
5 an articulated policy of the law when they move in back
6 of the four year statute.

7 Now, plaintiffs in their papers recite the traditional
8 mantra that since we are wrong doers, we should therefore
9 suffer to the full extent of their ingenuity. And they,
10 of course, take advantage of the pleading posture we are
11 in that, of course, we must confess that for purposes of
12 these motions, even though we are entitled to the usual
13 presumptions otherwise. But that same mantra can be
14 recited into any application of the statute of limitations.
15 And the purpose of the statute is not to thwart plaintiffs
16 or to protect defendants against rightful claims, but to
17 thwart injustice and to protect the processes of justice
18 against stale claims and against the injustice that can
19 arise when you are faced with trying to defend stale claims
20 on old memories and old documents as to the circumstances
21 of their making and all the rest, is hard to reconstruct.
22 And the Supreme Court has pointed out in United States
23 versus Gordon Lumley Company, 260 US at 201, quoting

24 "The defense of the statute of
25 limitations is not a technical

1 defense but substantial and
2 meritorious, and the great
3 weight of modern authority is
4 to this effect."

5 And again the Seventh Circuit in the Akron Pressform
6 Mold Company case at 496 Fed 2nd at Page 233 stated, again,

7 "Plaintiffs' claim to exemption..."

8 I am adding the words to make sense out of it, from
9 the statute of limitations, quoting again,

10 "...is against the current of the
11 law, and is founded on exemption.
12 The point is that they are running
13 counter, not with."

14 I think the third reason, and I hate to put an
15 echelon as to importance between the second and the third,
16 but that third reason is well spelled out in the Manual.

17 Now, contrary to what plaintiffs suggest that
18 fraudulent concealment allegations should be treated with
19 special solicitude in an anti-trust case, it is quite the
20 contrary, as the Manual points out in Section 1.06, that
21 the determination should be as early as possible. I am
22 not quoting, because "The discovery would be comparatively
23 narrow in scope of time. . ." if you do not have the
24 fraudulent concealment problem. And the reason why it is
25 especially important in anti-trust cases, Your Honor, is

1 that anti-trust cases typically, as this case does, call
 2 into question the marketing practice of an entire industry.
 3 And no matter how wisely this Court and counsel, working
 4 together, as I am sure we will, to limit the scope and
 5 focus what we have to do, this case will necessarily involve
 6 the review of tens, indeed I think hyperbole always weakens
 7 an argument, so I am really misleading, in a sense by
 8 saying tens because it is really hundreds of thousands
 9 of documents, and really enormous discovery burden on both
 10 sides. And what plaintiffs seek is what Rule 2(b) denies,
 11 and that is license to roam and expand such already burden-
 12 some discovery unlimited in time.

13 Now, plaintiffs, responding, conjure with phrases
 14 that we have come to expect, and one phrase that is a good
 15 one that we generally see is "tyranny of labels." It
 16 appears at Page 10 of their brief. And, of course, we
 17 don't ask that this Court conjure with labels, but apply
 18 the law as implemented by common sense. The plain, practical
 19 matter is that if plaintiffs' view is true that when they
 20 plead conspiracy and conspiracy is self-concealing that
 21 therefore conclusory allegations of fraud are sufficient,
 22 then plaintiffs can by simply a recycle of these magic
 23 words -- and it is a recycle that can be put on one card,
 24 an empty 3-2 card, which would be very convenient and go
 25 right under the file under F, fraudulent concealment, or

1 C, if that is how they categorize it. Put it in a machine,
 2 and they by this act, by this conjuring, they have simply
 3 read for all these pre-trial purposes, they have read the
 4 specific statute and the specific will of Congress right
 5 out of the anti-trust laws that we, you know, that there
 6 is only world enough and time to examine an entire industry,
 7 and the four year statute and courts have generally given
 8 a year or so running start on that. But there is, you know,
 9 there is just only so much time. And this, I think, would
 10 be a tyranny of labels to allow this to happen.

11 Plaintiffs also say that all we are entitled to is
 12 fair notice of the claim asserted. But as a practical
 13 matter, such a fungible verbal formula is no notice at all
 14 of plaintiffs' claims. What it is notice of is only what
 15 plaintiffs hope to find a claim as they roam back through
 16 these ancient documents. And, in fact, if what plaintiffs
 17 seek is upheld, then really as a matter of convenience, we
 18 could just simply say that they could stamp a capital F on
 19 some other symbol right on the front page of the complaint,
 20 and we deem this four year statute thereby waived for all
 21 purposes up through the final pre-trial conference when
 22 this Court will consider motions for summary judgment on
 23 all issues in the case. And that little F right on the
 24 front page would tell us no less or no more than what
 25 plaintiffs now tell us about their claims.

1 Now, as to that, plaintiffs say well, the usual
 2 fraudulent concealment is a pleading issue and can be
 3 disposed of "At the completion of discovery. At that time
 4 the Court can determine whether plaintiffs have adequate
 5 evidence to permit submission of this issue to the jury."
 6 This is Mr. Kohn who is being a reasonable man. That was
 7 the suggestion at Page 21. But of course it isn't reasonable
 8 because any and all issues raised by the plaintiffs can
 9 be disposed of after full discovery at the final pre-trial
 10 conference. And by motion for summary judgment, if
 11 plaintiffs have established no claims -- and what
 12 plaintiffs argue in effect, Your Honor, is that their
 13 pleading is, in fact, adequate, and that the question of
 14 fraudulent concealment, contrary to the law we submitted,
 15 need not be specifically pleaded, and contrary to the
 16 Manual, should not be determined early. But during the
 17 entire course of pre-trial discovery, no time limitation
 18 should be imposed upon plaintiffs. The point is that for
 19 plaintiffs to satisfy the statute which Congress imposed,
 20 and to impose the enormous additional burden of expanded
 21 discovery, they must have more than they have here. Now,
 22 they must have more than -- they hope to find something,
 23 and they must demonstrate that fact by pleading that more
 24 as required by Rule 9(b).

25 Now, again, as a practical matter, addressing the

1 facts here, defendants have not, we are not standing on
 2 some narrow hypothetical point here because we have
 3 agreed to give the plaintiffs all the documents produced
 4 to the Grand Jury, and those are the documents which the
 5 government presumably thought were relevant. And those
 6 documents are, in fact, being photocopied by plaintiffs
 7 at this very time. Now, some of these documents go back
 8 to 1966. That is over 20 years time. And the point is
 9 that these documents are available and were collected
 10 already before the suit was filed. And the burden of
 11 processing those papers was very substantial. I think the
 12 plaintiffs could tell you that. And we are having all
 13 sorts of problems with microfilming, depository, all the
 14 rest. But even that burden would be trivial as compared
 15 with thrashing de novo through all the papers unlimited
 16 by time under this license that plaintiffs seek by a
 17 mechanical and conclusory pleading. And this, Your Honor,
 18 is -- again, I could have stopped out of courtesy to
 19 Judge Harris at the end of reading his opinion. But this
 20 is the practical, common sense reason behind a good rule
 21 which advances the policies of prompt and fair determination
 22 of anti-trust claims. And that is that if plaintiffs seek
 23 to set aside the policy articulated by Congress, that their
 24 claims shall go only four years. Under a pleading of fraud,
 25 that fraud must be specifically articulated in limine before

1 they are entitled to roam back and impose that burden upon
2 all the parties. Thank you, Your Honor.

3 THE COURT: You are welcome.

4 MR. FERGUSON: Your Honor, Joseph
5 Alioto will respond for the plaintiffs.

6 (Off the record)

7 MR. ALIOTO: Your Honor, Mr. Kirkham,
8 who is the very able son of a very able father, has made
9 a very fine argument with respect to the matter of fraudulent
10 concealment. But I fear that the factual context in which
11 we are dealing calls for the denial of this motion. We
12 aren't going to go on technical grounds. First of all, it
13 is pretty clear to us that they have misconceived their
14 procedure. A motion to strike is not the way to get a
15 summary judgment. This is what they are asking for, a
16 summary judgment limiting liability to the four year period
17 as against a period in 1949 when apparently some of these
18 conspiratorial meetings started, according to a bill of
19 particulars filed by the government.

20 All Rule 12 calls for is striking the matter which
21 is redundant, immaterial, impertinent, or scandalous. And
22 nobody suggests that an allegation about fraudulent conceal-
23 ment comes within any of those categories. We respectfully
24 submit that they misconceived the procedure here, that a
25 motion to strike is not proper, that what they are looking

1 for is really summary judgment, which would cutoff liability,
2 cutoff recovery of damages for those who have been victimized
3 over an obviously longer period of time if this motion is
4 granted.

5 But we don't go on that technical basis. And we
6 aren't going to get involved in any long dissertation
7 about whether or not Rule 9(b) applies to fraudulent
8 concealment. Those of us who have looked at the history
9 of that rule are pretty certain that they were talking
10 about common law fraud, allegations of common law fraud
11 and not fraudulent concealment, which was another matter.
12 But in the Suckow Norax case it is true that the Ninth
13 Circuit, after it decided that Suckow was on notice in
14 1931 in connection with an application he filed himself
15 before the Post Office Department, after they decided that,
16 that he was on notice as long as that period of time --
17 and he filed his action in the 1940's -- then threw in the
18 statement that 9(b) requires a more particular pleading of
19 fraudulent concealment. But, you see, the factual situation
20 was there that Suckow himself had filed an application
21 alleging monopoly of the Norax trust 20 years before he
22 filed this action. Nevertheless, we aren't going to argue
23 that. We are willing to assume right now that 9(b) applies.
24 We are willing to assume, for the purpose of this argument,
25 that 9(b) applies.

1 Nine (b) isn't self executing. It doesn't actually
2 tell you what happens in the event you don't plead it
3 that way. So they have gone to Rule 12 in connection with
4 the motion to strike, and we say it is really a disguised
5 motion for summary judgment, and therefore, all of the rules
6 on summary judgment are to apply here.

7 But we go beyond that. Let's assume it applies only
8 for the sake of the argument. We don't really think it
9 does, nor does the history of the rule justify any statement
10 that it does. But we are dealing here with a peculiar
11 factual situation. All we said here was that we didn't
12 know about this until the government filed an indictment
13 Now, that is a concise and plain statement, as required by
14 Rule 8. Even 9(b) doesn't preempt 8. It doesn't knock it
15 out of the box. You have to read these rules together. And
16 they are asking us to make a precise, concise statement
17 in plain language. And we tell them in plain language we
18 didn't know about these collusive, conspiratorial meetings
19 until the government returned an indictment. That simple
20 statement was sustained in the Tovona case in this circuit
21 very recently, and it ought to be sustained here a fortiori,
22 really, because of the factual context I would like to go
23 into.

24 Conspiracies under the anti-trust laws don't have
25 to be collusive. They don't have to be secret. The most

1 famous price fixing case of all, Your Honor, is United
2 States v. Seaton Vacuum, which involved a buying program
3 in the mid-continent. The argument was it wasn't secret
4 at all. In fact, the government had encouraged it. The
5 government knew about it, and the government consented
6 to it. So there you have a non-secret price fixing agree-
7 ment, a non-collusive price fixing agreement. This is the
8 way you divide the cases, the cases particularly that the
9 defendants have spoken about.

10 Where you have collusive conspiracy, on the other
11 hand, as against non-collusive conspiracy, the collusive
12 conspiracy, where the averments of your complaint, the
13 fair intendment of the pleadings in your complaint, are
14 to the effect that they had secret meetings, that they
15 were hiding what they were doing. Those were the averments
16 of this complaint, that they used intermediaries to convey
17 their confidential price stabilization schemes one to
18 another; that they used third parties, brokers in this
19 case. These are the allegations of the complaint. So that
20 when your conspiracy is collusive in the sense that it is
21 secret, concealed, and covered, and you have alleged that.
22 And then you have alleged that the government brought an
23 indictment, as we have alleged here, all of us, in connection
24 with the tolling section -- and you have to read the whole
25 thing -- and then you say we didn't know about it until the

1 government brought the indictment.

2 Now, that is the plain pleading of the facts. And
3 take their arguments on 2(b), which we think are erroneous,
4 and let's assume that Rule 12 applies. And even under all
5 of these tests it is clear that we have made the allegation
6 that is necessary.

7 Now, what is the factual situation? First of all,
8 let me indicate some other non-collusive conspiracies, so
9 that you can rationalize the cases they have cited. A
10 conspiracy to monopolize that takes place by successive
11 acquisitions or mergers is obviously a non-collusive
12 conspiracy but a conspiracy, nevertheless. A resale price
13 agreement that is in a written contract is a conspiracy
14 to fix prices, but not a secret one. An agreement to use
15 a process patent to monopolize an unprocessed or an
16 unpatented commodity is a conspiracy, but it is generally
17 in writing. They generally have it in license agreements.

18 Now, all of the cases that they are citing fall
19 in the other category: that is, the category of the non-
20 collusive conspiracy. The Dayco case that they rely upon
21 so heavily dealt with an allegation that there was a
22 monopolization of the tire industry. The fellow who
23 complained, the plaintiff, was a member of that industry.
24 And it appeared that several years before that there was
25 a congressional hearing in which the evidence of the

1 monopolization was clearly set out for the record for the
2 public generally, let alone those who were in the industry.
3 So they, in effect, told Dayco -- and there wasn't a motion
4 to strike, incidentally -- they, in effect, told Dayco,
5 you tell us why you didn't know about this in the line of
6 these public hearings. That is the substance of that case.
7 So you have to simply reject all of the cases they talk
8 about which relate to non-collusive conspiracies either to
9 fix prices or to monopolize.

10 All of the cases, on the other hand, where you do
11 have affirmative concealment, as in the electrical cases,
12 the courts make the distinction of those conspiracies that
13 are self-concealing. This is the language Judge Fineberg
14 used in the Ohio electrical case that Your Honor is very
15 familiar with. That was the case when Milton Handler
16 became converted to the plaintiffs' side of the anti-trust
17 law. He did very well for us and established some very fine
18 law. And he has been writing annual reports to judges
19 ever since, trying to diminish the importance of those
20 plaintiff anti-trust principles he established.

21 Nevertheless, you remember in that case, Judge --
22 now that I have got that dirty crack out of my system --
23 you remember in that case, Judge, that Judge Fineberg said
24 when they talked about fraudulent concealment, that this
25 is the kind of a conspiracy -- without quite making the

1 distinction — that is self-concealing. And most of us
 2 didn't know about the electrical cases, as a good example,
 3 until the indictment. My office had filed the case eight
 4 years before that time, and I was told it was a strike case,
 5 bringing the case against General Electric. We didn't know
 6 about it until the indictment was returned. And those cases
 7 followed in the wake of that indictment. And the allegations
 8 of fraudulent concealment there were a little more detailed
 9 because by that time we had been given the information of
 10 the color codes and the coded names and all of that business,
 11 and some of us alleged it.

12 THE COURT: The phase of the moon, also.

13 MR. ALIOTO: The phase of the moon.

14 That was the best one of all, depending on which phase that
 15 moon was in. Best one of all.

16 Now, then, if you analyze their brief in the argument,
 17 they say there are certain things that should have put us
 18 on notice. They say in 1972 Mr. Ferguson filed a case up
 19 in Seattle called 1912. The 1912 case. And that should
 20 have put us on notice, they said.

21 Now, Judge, I am willing to concede that Seattle is
 22 the hub of the universe. I am willing to concede that.
 23 And I am willing to concede that when added to Tacoma, it
 24 should be the center of all American eyes. And I am even
 25 willing to concede that Mr. Ferguson is one of the more

1 glamorous stars in the legal firmament, but I don't think —

2 THE COURT: When you get to Tacoma,
 3 Mr. Alioto, I will have to agree that you are as near
 4 paradise as you are ever likely to get.

5 MR. ALIOTO: That is what I said,
 6 when you cluster it with Seattle, it should be. But conced-
 7 ing all of that, Judge, that doesn't justify some Italian
 8 down in San Jose who runs the San Jose Canning Company,
 9 which I represent, it doesn't justify him in knowing in
 10 1972 that there was something wrong with the sugar prices
 11 he was receiving. And that is in fact what they said. It
 12 doesn't justify him at all. The government indictment
 13 did.

14 Now, they argue, too, that this Grand Jury was
 15 impaneled in 1972, and therefore we should have known then.
 16 Just the impaneling of the Grand Jury. Some of us, with
 17 a little background in this business, in the sugar business,
 18 thought just the opposite. Some of us thought that having
 19 gone through the sugar trust case at the turn of the
 20 century, and some of these companies having been put through
 21 a wringer in the glucose trust case in 1916, the famous
 22 Learned Hand decision, and thereafter having been named in
 23 the sugar institute case beginning in 1935 with their price
 24 posting schemes, with policing of the price posting, some
 25 of us believed that after that kind of an anti-trust history,

1 it was inconceivable to us that these fellows would go
2 around furtively in hotel rooms throughout the United States
3 rigging prices, making accusations about not maintaining
4 the price agreement, giving allowances that they shouldn't
5 give. Some of us thought just the opposite, that that
6 Grand Jury was impaneled, but like a lot of grand juries,
7 it would come to nothing.

8 It isn't fair to say as a factual matter that because
9 they impaneled the Grand Jury here in 1972 that we were
10 put on notice and we have to explain why we didn't file
11 our complaint in 1972 when they impaneled the Grand Jury.

12 Finally, I think there is this to say about the
13 matter. There is a real paradox we are dealing with here.
14 These folks have filed answers in this case in which they
15 deny that conspiracy that they claim we ought to know all
16 about. That is actually the pleading in this case. And
17 that is a real paradox. They, in effect, say we didn't
18 do it, but you are negligent for not pleading the facts to
19 show that we did do it. And so right up to this moment,
20 you are having right in this Court a denial of the
21 conspiracy that they say we should have known about enough
22 to plead evidentiary facts. What we said was sufficient,
23 it was concise, it was plain. We simply say we didn't
24 know about it until the government indictment.

25 Now, the government indictment carries with it a

1 bill of particulars. That bill of particulars showed that
2 beginning in 1949, there was a series of collective meetings.
3 That bill of particulars showed that beginning in 1949 and
4 continuing in the early part of the '50's with some intensity
5 there was a series of telephone calls exchanged relating
6 to price stabilization schemes. It also shows that inter-
7 mediaries were called upon to carry secret messages in that
8 whole period from 1949 to the beginning of 1973. This is
9 what that bill of particular shows. Your Honor, of course,
10 can take judicial notice of that bill of particulars and
11 read that bill of particulars. You have got to be impressed
12 with the fact that that corner down in San Jose, even
13 though he is a very substantial corner, had no basis at
14 all for assuming that all of this stuff was going on during
15 that period of time. So all he has to plead, as they
16 pleaded in Tavola, it was fraudulently concealed, the
17 nature being self-concealing, that no diligence on my part
18 could possibly have discovered that series of secret,
19 collusive events from 1949 down to 1973. And finally, that
20 I found out about it when the government returned an
21 indictment.

22 Now, even as I say, assuming they are procedurally
23 correct, assuming 9(b) applies, there isn't any doubt that
24 in the light of this exposition that this action must be
25 denied.

1 THE COURT: Mr. Kirkham,

2 MR. KIRKHAM: Very briefly, Your

3 Honor. I had the misfortune or actually the fortune to
4 study Greek in college, and the word "hypothesis" is very
5 usual when it says to say something by purporting not to
6 say it. It is usual when you don't think the judge is too
7 up on things to say there is no need to mention such and
8 such because you have well in mind that -- and then you
9 tell him. We have several arguments. Mr. Alioto said --
10 Mr. Alioto, of course, as you know, is a very hard nut to
11 follow. I hope you will make an appropriate accommodation.
12 He made a number of arguments he said he wouldn't make. I
13 do ask leave to answer the arguments that he made while
14 saying he didn't make them.

15 One, he said he wasn't going to make the argument
16 that was obviously true that Rule 12 limits Rule 9. Then
17 is, that you have to meet one of the criteria to strike
18 under Rule 12. And I think Judge Harris' decision properly
19 disposes of that, in which he implements Rule 9 and does
20 change it into a motion for more definite statement.

21 But in fact, there is no limitation built in from
22 Rule 12 into Rule 9. And as to the authority, as to the
23 point that you must have a collusive -- distinguishing
24 between a collusive conspiracy and a non-collusive conspiracy
25 and the assertion, again, you can have conclusory pleading

1 of fraudulent concealment in a collusive conspiracy
2 situation automatically. And I believe that is the bottom
3 line of what Mr. Alioto argues here. And of course, Judge,
4 the decision in the Lucky Branding case itself was a
5 concealed conspiracy. And while I didn't bring the first
6 class action case anywhere, Your Honor, I was involved in
7 the Left Hand Pit Barbecue case in the Southern District
8 before Judge Nielson, which was an alleged concealed type
9 conspiracy. And in that case Judge Nielson likewise made
10 an order and held that this conclusory form of fraudulent
11 concealment pleading is improper. It was a collusive
12 conspiracy case, adopting Mr. Alioto's distinction, and they
13 that that has some substance.

14 I am also informed by Mr. Raven that both Judge
15 Fitzgerald and Judge Sharp in actions very recently in
16 which he was involved have likewise ruled that the conclusory
17 pleading of fraudulent concealment is inappropriate. Again,
18 this is --

19 THE COURT: Did he strike it?

20 MR. KIRKHAM: I believe, Your Honor,

21 he sustained in all these cases a motion for definite
22 statement, which, in effect, was striking with leave to
23 amend. I believe I have addressed the point earlier, and
24 we don't argue here that if it should be stricken, it
25 should be stricken without leave or anything else like that.

1 What I do think is that what neither, certainly, the Court
 2 doesn't want and what nobody wants is a reworking in a lot
 3 more words in three pages to say another series of
 4 conclusions. And in effect granting a motion for more
 5 definite statement you are, in effect, saying this pleading
 6 isn't enough but go ahead and try again but under these
 7 guidelines. And the guidelines, we respectfully submit,
 8 should be that conclusory allegations are not proper. And
 9 it doesn't matter whether you go on for three or four pages.
 10 And you start talking, and Mr. Alioto did, as to what you
 11 imagine to be the hotel rooms and all the rest, what you
 12 imagine to be the particulars of the case in chief, the
 13 affirmative acts of concealment, and also the acts of due
 14 diligence and the absence of actual knowledge.

15 Now, Mr. Alioto speaks of a canner in San Jose, and
 16 he does deal with the 1912 question. Of course, there was
 17 an earlier case filed in January of 1971 alleging a
 18 conspiracy involving the entire Inter-mountain northwest,
 19 part of the so-called California-Arizona market and part of
 20 the Chicago-west market, again asserting that sugar companies
 21 were in some kind of a conspiracy. Again, I don't think
 22 that we are addressing on the merits of whether they made
 23 that showing, if you would hold that the pleading was
 24 sufficient, but as a point it would be the kind of due
 25 diligence questions that should be addressed. There would

1 be, for example, they attacked the basing point system,
 2 so-called, even assuming whatever system it can be called,
 3 whether it be a basing point system or not. That system
 4 has been implemented by the sugar companies since at least
 5 the turn of the century and has been openly used.

6 Last, I didn't think -- well, Mr. Alioto got away
 7 with it because he is so damned charming. He said why, Your
 8 Honor, they still deny the conspiracy here and yet they
 9 ask us to plead fraudulent concealment. Obviously, they
 10 are concealing it because they deny what we have charged
 11 them with. Well, I just don't think that merits any
 12 further comment except to say that they have got to show
 13 what due diligence they exercise to discover what they
 14 assert to be true. And they have got to show affirmatives,
 15 plead affirmative acts of concealment or else, as I pointed
 16 out earlier, that we have in effect here is an automatic
 17 ritual simply striking from the books a four year statute
 18 of limitations and a license to roam unlimited in every
 19 case where someone asserts conspiracy. Thank you, Your
 20 Honor.

21 THE COURT: The matter is submitted.

22 Now, the next matter is Number 6 on the calendar,
 23 and that is the motion to dismiss the perjury patrice claim,
 24 and that pertains only, as I understand, to the State of
 25 Washington. Is that correct?

1 MR. KIRKHAM: Yes.

2 THE COURT: I propose to go ahead
3 and hear the argument on that. However, it is quite clear
4 that at this time we would not be able to finish the
5 balance of this calendar today, and if you would prefer,
6 we could take these matters and conclude our calendar by
7 noon. It has been a long and strenuous day for you.

8 (Off the record)

9 MR. FREEMAN: Is it possible to have
10 these two remaining matters submitted on the memoranda?
11 As a matter of fact, both those matters only involve one
12 or two of the plaintiffs, and we might be able to finish
13 up in the next ten or fifteen minutes with the matters of
14 general interest to everybody. And if those motions had
15 to be argued tomorrow, many of us would not even attend.

16 MR. FIFTH: We submit that matter
17 on pending jurisdiction, Your Honor.

18 MR. KIRKHAM: I was designated to
19 argue all these motions at once, Your Honor. I was to do
20 all three of them, and my arguments would be very brief,
21 indeed. I would just suit your convenience on the matter.

22 THE COURT: I have no preference.
23 I am just trying to be considerate of you gentlemen. You
24 have been here all day. You have had a lengthy proceeding,
25 and if you can't finish all of it tonight, why not come

1 in the morning when we are all fresh and proceed at that
2 time.

3 MR. KIRKHAM: Your Honor, we have
4 caucused here briefly among defendants, and I am sure, taking
5 due account as to my persuasiveness in arguing, they
6 suggest we do submit these last two. But actually, I think
7 the papers in those two cases really do clearly state it.

8 THE COURT: Could we accommodate any
9 of you who wish to get away tonight?

10 MR. FREEMAN: There are a few things
11 I will clean up, Your Honor.

12 THE COURT: I didn't mean to exclude
13 you by turning to Mr. Kirkham so much, but I have in mind
14 that you are here.

15 MR. BORDER: Your Honor, I am
16 Tom Border, assistant attorney general for the State of
17 Washington. And if the Court feels that the matter on
18 the parent patrias situation is adequately briefed, and
19 if defendants do not wish to argue, then we would not
20 submit oral argument.

21 THE COURT: If you want to submit it
22 it's fine, but I am still going to break now and resume
23 in the morning and finish because I want to hear something
24 on some of these latter matters.

25 MR. KIRKHAM: Which ones do you --

1 THE COURT: Well, I want to get some
2 views expressed concerning what, if anything the Court
3 should do with respect of these proposed settlements that
4 have been mentioned. And I don't think you should do that
5 lightly. It is a serious matter, and if you care to
6 enlighten the Court of your views on that, you should be
7 thinking about it and advise me. If you don't, all that
8 I would do about it is let it rest until an undisclosed
9 future date.

10 MR. FORTUSON: You don't want us to
11 do that now.

12 THE COURT: I would like to have your
13 views about it if you want to express them now. Mr. Fortson,
14 of course, has expressed his rather vigorously in that
15 letter, but I don't want to deal with it that way. I want
16 to have some constructive suggestion of what we should do
17 at this point with respect of this matter.

18 MR. FORTUSON: Do you want us to go
19 ahead now?

20 THE COURT: In the morning.

21 MR. FORTUSON: Could we come back in the
22 morning?

23 THE COURT: By now it is almost eleven
24 time, anyway. We will reconvene at 9:30 in the morning.

25 (The Court was adjourned
until 9:30 a.m., December 10, 1975)

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

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6 SUGAR ANTI-TRUST LITIGATION
7

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9 PRE-TRIAL CONFERENCE

10 December 10, 1975
11

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15 Before the Honorable GEORGE H. BOLDT
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1 THE COURT: Good morning, everyone.

2 As I understood, you were contemplating submitting the
3 motion to dismiss parens patriae on the memoranda. Do
4 you still feel that way about it, or would you like to
5 argue the matter?

6 MR. KIRKHAM: Your Honor, as far as
7 the defendants are concerned, we would submit that and also
8 the other motion on the papers.

9 MR. BOEDER: And if the defendants
10 have no argument -- Tom Boeder, assistant attorney general
11 for the State of Washington -- if the defendants have no
12 desire to make oral argument of the parens patriae matter,
13 then we would also submit it on the brief, Your Honor.

14 THE COURT: Very well, it is submitted.

15 And also the state anti-trust allegation motion to
16 strike?

17 MR. FERGUSON: The plaintiffs are
18 willing to submit that, Your Honor.

19 MR. KIRKHAM: Yes, and the defendants
20 likewise.

21 THE COURT: Very well, the matters
22 are submitted on the memoranda.

23 At this point, I would like to have a report as to
24 what, if any, plans or programs have been agreed upon with
25 respect of continuing discovery or other procedures as

recommended by the Manual.

1 MR. FERGUSON: Yes, Your Honor. I
2 would like to speak to that matter, if I may. Mr. Freeman,
3 as you and all the defendants and all the plaintiffs know,
4 has written a letter on this subject. And I have not
5 responded to it because I didn't feel that that would throw
6 very much light on the subject. But I do think I should
7 make a few statements. Did you ask for --

8 THE COURT: I wasn't at that point.
9 Before we get to the final matter, which would be what I
10 think you are speaking of --

11 MR. FERGUSON: Excuse me. Mr. Freeman
12 is going to speak for the plaintiffs on the discovery
13 matter. I am sorry. I misheard.

14 MR. FREEMAN: I will speak on both
15 matters.

16 THE COURT: Yes, I would like to get
17 an idea of what you have in mind for ongoing preparation.

18 MR. FREEMAN: We have been appointed
19 as chairmen for the plaintiffs' discovery committee. And
20 I have been operating with Jerry Saltzman (phonetic), who
21 is unfortunately not in Court today but inspecting documents.

22 In any event, the plaintiffs have been organized
23 into discovery teams. And we have given specific responsi-
24 bility for named defendants for co-conspirators and for
25

1 other likely sources of information to possibly 25 different
2 attorneys. And we have been sheparding their work.

3 The first thing we sought to do was to have the
4 Grand Jury documents microfilmed. And we did achieve
5 complete microfilming except for Great Western documents,
6 which are now available and being microfilmed, except that
7 the process was not satisfactory. The legibility of the
8 documents failed to come up to standards. And so we are
9 now in the process of re-microfilming it without excess
10 expense, some little expense.

11 But those documents will be microfilmed and put
12 into the document depository and available to the various
13 plaintiffs. We have initiated a program of deposition
14 of third parties, not defendants, but third parties such
15 as some of the brokers, McKinney-Flavelle (phonetic), I
16 guess one of the principal brokers in this whole industry,
17 certainly in this area. We have had his deposition or one
18 of the representatives, taken by our office, for the
19 purpose of document discovery. And we are pleased with
20 the cooperation that we have been getting from them and
21 the turnover of documents that go beyond what was turned
22 over to the federal government.

23 We are also in the process of scheduling depositions
24 for Imperial, who is a non-defendant, and for others. These
25 are moving along at the present.

1 We have prepared and will serve upon the defendants
2 plaintiffs' interrogatories in about ten days. We have
3 already received from the defendants their interrogatories.
4 We have some objections to some of the transactional
5 material, and there have been discussions between Mr. Cooper
6 and the defendants' representatives. And we feel that it
7 is likely that a great many of the objections that we have
8 to their interrogatories -- and we will also combine, then,
9 whatever objections they will have to our interrogatories --
10 will be thrashed out and many of them eliminated so that
11 we will not have to come to the Court for the disposition
12 of disputed items.

13 We will try to keep them to a minimum. Possibly,
14 I am being too sanguine when I think that all disputes can
15 be resolved. But we are now in the process, the second
16 stage process. The first was procuring documents that are
17 available. And that is the Grand Jury documents which are
18 being microfilmed and the third party documents which we
19 are now getting through depositions and request for document
20 production.

21 The second step is getting our interrogatories to the
22 defendants. And the defendants have gotten their interroga-
23 tories to us. And we will process that very promptly.

24 The third great discovery area is depositions. Now,
25 we have decided in our own minds that we cannot start a

1 deposition program with the defendants until we have
2 completed the microfilming of the defendants' Grand Jury
3 documents. That should be shortly. We think it will take
4 us several months to collate those documents, and each one
5 of the plaintiffs that have a responsibility for a particular
6 defendant will have to take those documents and collate
7 them in preparation for depositions. We think we will be
8 on the road with the depositions in three or four months,
9 and that will be a very speedy program.

10 With respect to depositions, we intend to send out
11 a notice of depositions, and then arrange with the defendants
12 to schedule them for the convenience of the defendants'
13 counsel as well as the deponents that are involved within
14 reason. If we cannot reach agreements to a scheduling
15 program, then, of course, we would have to submit the
16 matter to the Court.

17 I think it is fair to say that we have progressed
18 discovery with remarkable dispatch in view of all the
19 preliminary questions that we have also had to address
20 ourselves to in this massive litigation, and that there
21 really is no necessity for a court order at this time.

22 We will promise to come to the Court for a possible
23 court order in the event we find that our program as I have
24 outlined it is bogging down. I have been handed a note
25 with respect to Grand Jury transcripts. We do propose in

1 a matter of a few days to file a motion to procure those
2 Grand Jury transcripts that have been inspected by any of
3 the defendants, and under the prevailing decisions of
4 several of the courts, if a Grand Jury transcript was
5 inspected by one of the defendants, then it can be made
6 available to the plaintiffs. At any event, we will present
7 that issue to you before the next pre-trial disposition.

8 THE COURT: Would you like to speak
9 now, Mr. Raven?

10 MR. RAVEN: I think Mr. Kirkham will
11 speak to this, Your Honor.

12 MR. KIRKHAM: I think, if I read the
13 bottom line correctly is that what is proposed is that we
14 continue working together without imposing on this Court
15 until such time as we are unable to work together or we
16 have to have those disagreements. And I concur. We will
17 be working these things out.

18 MR. FREEMAN: That is exactly right.
19 And as a matter of fact, the process has been a very
20 cooperative one thus far. We may have disagreements
21 concerning certain items, which we will catalog and bring
22 to your attention. But our cooperation has not been --

23 MR. KIRKHAM: We hope to bring light
24 and not heat.

25 MR. RAVEN: One thing the record
should show, I think you mistakenly said we served our first

1 wave interrogatories. All we have been served is class
2 action determination --

3 MR. FREEMAN: I don't think it is
4 a matter of first wave or second wave. Your Honor, what
5 it is now, if it is only transaction interrogatories, that
6 you have served, we will accept -- our interrogatories will
7 go to the merits of the liability issue, and I assume
8 somewhere along the line you will want to do the same if
9 you haven't done so previously.

10 And just a little pun. Mr. Kirkham spoke about
11 light, not heat. I would say sweetness and light.

12 THE COURT: I am not only pleased,
13 but I am proud of you. This is a remarkable performance,
14 unmatched in my rather extensive experience. Of course,
15 to be completely candid, by now most of the counsel who
16 engage in the anti-trust field of law have learned that
17 this is the best way to do it. It is infinitely better
18 for the counsel themselves to set schedules that are
19 reasonably convenient to both and it is for the Judge,
20 who has a limited understanding of what your problems are,
21 to fix arbitrary dates. So I am pleased to approve this
22 program that you have prepared so very well. You'll
23 recall that last January at the ending of our first
24 conference, I commended you most heartily, not only that
25 day but in other quarters, in the hope that other parties
might get the idea of how to do it.

1 When I say I am proud of you, I mean it most sincerely.
2 You are among the elite of the bar. You are doing a
3 magnificent job of going forward with this litigation, and
4 I am sure it will be to the advantage of your clients
5 because, after all, this is not the lawyers' lawsuit; it
6 is the litigants' lawsuit. And we must ever keep in mind
7 that what we do to minimize expense, time, and effort is
8 to the advantage of the litigants. So I say, continue as
9 you are doing. Only I would like to have at monthly
10 intervals or some such thing, a sort of status report to
11 be sure that everything is going well. Of course, I would
12 also be available on short notice at any time to participate
13 in any hearing that you think can't be avoided. I think
14 that covers the subject, and I thank you.

15 I think, then, this does bring us to the last matter
16 we had in mind. It appears there may be a possible
17 impropriety in my receiving the documents concerning the
18 Holly transaction. Fortunately, as Mr. Raven knows from
19 first hand, I got those documents yesterday morning and
20 had no time to read them excepting to scan the title. They
21 are still just the way I got them, and I am not ever going
22 to look at them again until an appropriate time comes when
23 all agree that it would be proper. So let that settle your
24 mind about that.

25 Secondly, I have not the faintest idea, nor have I

1 ever had any idea, that any settlement could be considered
 2 until after the ruling of the Court on class action. So
 3 if you were preparing to make argument on that subject,
 4 I will listen, but understand that that is my plan. I am
 5 going to try to get that decision made at the earliest
 6 practicable time, which should not be very far distant.

7 I think there is nothing else I should say excepting
 8 perhaps to have a statement as to the circumstances, or
 9 whatever you deem appropriate.

10 MR. FERGUSON: Yes, Your Honor. I
 11 do feel I should give the defendants and Your Honor just
 12 a very, very slight history of what has happened, so that
 13 you will all have the proper picture. Some people may have
 14 gotten the wrong idea.

15 THE COURT: By the way, anyone who
 16 wishes to speak on the subject or contribute anything at
 17 all is welcome. If there are very many of you, we will
 18 divide up the time. You have until noon to make your
 19 comments.

20 MR. FERGUSON: Well, we don't
 21 anticipate, we don't want to argue the whole thing, but
 22 I just do want to give everybody a small picture. After
 23 Your Honor appointed the Plaintiff Steering Committee, we
 24 had a meeting of the Steering Committee. And at that
 25 meeting it was decided, just to handle things more

1 expeditiously, to appoint an executive committee. And an
 2 executive committee was elected from the Steering Committee.
 3 I am the chairman of that executive committee, and the
 4 names of the others are, I think, known to everybody. At
 5 the same meeting, a discussion was had of the advisability
 6 of considering an early settlement if we were approached.
 7 And it was decided that the executive committee would
 8 authority to negotiate if we were approached.

9 We were approached, and about a month ago we received
 10 a proposal that the executive committee could recommend to
 11 the Steering Committee, and this was the Holly proposal.
 12 They did recommend it, and it was approved by a substantial
 13 majority of the Steering Committee. It was reduced to
 14 writing and has proceeded forward. Money has been paid
 15 into a bank and has been invested in interest bearing bank
 16 certificates, a deposit. So much for that.

17 Part of that arrangement was that we would proceed
 18 as soon as possible to get the settlement before the Court
 19 to get it approved at the earliest possible time. And with
 20 that thought in mind, we did prepare a request for establish-
 21 ment of a schedule for consideration of this proposed
 22 settlement and to other settlements that did come along
 23 shortly after the Holly settlement. I might say, so that
 24 the record is very clear, that there are no other settlement
 25 discussions going on, nor will there be any other settlement

1 discussions go on until these three settlements are fully
 2 heard and disposed of by Your Honor. So that anyone being
 3 concerned about other settlement negotiations need have
 4 no concern. I have made that clear to the plaintiffs, and
 5 I am going to make it clear to the Court and to the
 6 defendants. No one is, on behalf of the plaintiffs,
 7 negotiating any other settlements.

8 There will be, however, hopefully two other settle-
 9 ments signed up within probably the next week. And what
 10 we would like to do, and that is why we have proposed a
 11 schedule here. We have proposed a schedule that takes
 12 into account the matters that are before Your Honor on
 13 class certification. We have no idea, of course, when those
 14 matters will be decided. But we have just come up with
 15 some suggested dates. And I would like to tell Your Honor
 16 what those suggested dates are. We think they are reason-
 17 able, that they give everybody time. They give everybody
 18 an opportunity to be heard, and that they make it clear that
 19 everybody is being protected.

20 Now, the first date that we propose is December 19,
 21 and that date is a date by which we hope to lodge with the
 22 Court the settlement agreements with the two other defendants.
 23 And there is no secret about that. Everybody knows who they
 24 are. They are Union Sugar Division of Consolidated Foods
 25 and California and Hawaiian Sugar Company.

1 Then, the next date we propose is January 9, 1976.

2 And we propose at that time, with the cooperation and jointly
 3 with Holly, with Union, and with C & H, the plaintiffs
 4 will file and the defendants, those three defendants will
 5 file a proposed plan of implementation of these agreements
 6 with the Court. Then we propose that on January 23 or
 7 before January 23 or before January 23rd, on or before,
 8 we -- or the Court have received written comments on the
 9 proposed plan of implementation which can be filed by any
 10 interested party, the other defendants, the settling
 11 defendants, the plaintiffs, or any interested party.

12 And then on February 6, 1976, we propose that we
 13 will file replies to any comments that have been filed with
 14 the Court, either by the other plaintiffs or other defendants
 15 or settling defendants. And then we hope that shortly after
 16 February 6th, that Your Honor would set a date for hearing
 17 on the form of an order, whether or not an order should be
 18 granted, whether a notice should be sent out, the form of
 19 notice, and everything that will be submitted to Your Honor
 20 with our plan that we have referred to to be filed on
 21 January 9. That is what we have in mind. We are not trying
 22 to push this thing, but we are trying to comply with the
 23 arrangements that we would proceed expeditiously with the
 24 settlement agreements. We would like to comply with that
 25 if we can, and we don't want to interfere in any way with

1 Your Honor's time schedule on these class action motions
2 that you have before you.

3 Now, I must also tell Your Honor and the defendants
4 that these matters were taken up in the Steering Committee
5 meeting last Monday. It was attended by 18 of the 19
6 members of the Plaintiffs' Steering Committee. At that
7 time there was a motion made in regard to these three
8 settlements, and there was a motion for the approval of
9 these by the Steering Committee. There was a yes vote of
10 12 of the 18. There was a qualified yes vote by four of
11 the remainder, and there was a no vote by two. I am just
12 putting that on the record so that everybody knows about
13 it now.

14 I am informed that maybe one or at least one of the
15 four might want to explain why they qualified yes, and I
16 think Mr. John Cochran will say something about that a
17 little later. I am perfectly willing to answer any
18 questions that Your Honor has or anybody else has about
19 this, but I must also say one other thing. At the Steering
20 Committee meeting, I asked if the plaintiffs would oblige us,
21 in the order about getting through on time, if they would,
22 if they had something to say over and above what the
23 designated speaker had to say, they would have an opportunity
24 for a very, very short statement at the end of our proceedings,
25 which I assume will shortly follow now. And so I would like

1 to ask, on behalf of any of our plaintiffs who did cooperate
2 and did cooperate very well and refrained from saying
3 something, if they have something new, not repetitious,
4 but if they have something new that they feel was not said
5 on these matters, I would appreciate it very much if Your
6 Honor would hear it.

7 THE COURT: I first want to inquire
8 whether any of the plaintiffs or defendants object to that
9 being done or wish to suggest the parameters of what the
10 discussion should be limited to or the like. Do you have
11 any comment on that subject? I would appreciate your
12 making whatever recommendation you have.

13 MR. RAVEN: I do have a statement,
14 Your Honor, on behalf of the defendants. But I appreciate
15 that some of the other plaintiffs want to speak on this
16 matter, too, and I would just as soon hear from them and
17 then follow. Thank you.

18 THE COURT: Very well, if that is
19 your choice. I wanted to be sure, though, that before we
20 proceeded any further you would have an opportunity to
21 speak.

22 MR. KIRKHAM: Just a minute, Your
23 Honor.

24 MR. RAVEN: My colleagues think
25 maybe I should make my statement now.

1 THE COURT: As you please.

2 MR. RAVEN: All right, Your Honor.

3 THE COURT: That is your prerogative,
4 to speak next.

5 MR. RAVEN: Your Honor, I appreciate
6 your bringing this up in chambers yesterday morning, and
7 you had some of our feeling on it at that point. But perhaps
8 I should set it forth at this time.

9 As we said, Your Honor, at that point, this is some-
10 thing that was none of Your Honor's making or none of ours.
11 In fact, the first we knew about the problem was when we
12 received a copy of Mr. Freeman's letter to Your Honor. I
13 happen to agree with much of that letter. I think
14 Mr. Freeman is right, and I think the Manual is right that
15 matters like this should not be brought on to the assigned
16 Judge when there are motions pending on the class. We were
17 very concerned about that, and then when we were advised
18 that -- and we were also, of course, aware that there
19 had been communications with Your Honor concerning the
20 Holly settlement, the amount of the Holly settlement. Holly,
21 apparently, or some of the plaintiffs apparently thought
22 that it was necessary to advise Your Honor of that before
23 they made the release which came out in the Wall Street
24 Journal. So we were aware of that background. We were
25 concerned about it because we knew we had before Your Honor

1 motions which we are very serious about, extremely serious
2 about.

3 One thing I didn't agree with in Mr. Freeman's
4 letter, I don't agree with his position on consumer class,
5 so I told Your Honor yesterday we have heard from the
6 Court of Appeals in this circuit twice in two years on
7 that in a very definitive manner. And we think the matter
8 is settled.

9 But we were disturbed about the plaintiffs bringing
10 this forward, and because of that when we were advised
11 by Mr. Cooper that they would be submitting to Your Honor
12 the Holly settlement, we took occasion, Mr. Kirkham and I
13 to advise them we did not approve of that. And Mr. Kirkham
14 sent a letter to Mr. Cooper to that effect and advised
15 him that defendants would not in any way acquiesce in the
16 propriety of what has occurred nor do defendants waive any
17 remedy they may have by recognizing the plaintiffs power
18 to raise any subject they want to or file any papers they
19 want. After all, they don't have to get our permission to
20 file papers. One of the things that was disturbing about
21 it, of course, was that Mr. Freeman had asked the plaintiffs
22 not to. Furthermore, another thing that is disturbing
23 about it some of these plaintiffs, the State of California,
24 for one, took the position in the antibiotic cases before
25 the panel, that when settlement matters had been brought to

1 the assigned judge's attention before there had been any
2 determination of classes, that the panel ought to assign
3 another judge.

4 Now, the panel did one thing in that case and spoke
5 another way. But I think that Your Honor ought to be aware
6 of that. They did assign another -- they never signed all
7 of the non-settling cases to another judge. At that point
8 they assigned them to Judge Milelord, and Judge Wyatt
9 became the settling judge. And they handled it in that
10 manner. On the other hand, the panel did say this, and
11 I think Your Honor, I am sure Your Honor has seen it in
12 the past. You have seen a lot of cases in the past. You
13 might want to take a look at it. In fact, I could hand
14 Your Honor a copy. It is in 320 F. Sup. ^{586, 588 (S.P.M.L., 1970)} The panel there
15 did take this point and they came to the conclusion that
16 it wasn't -- let me just start over again. It wasn't posed
17 quite as sharply as this because there wasn't at that time
18 the pendency of the class motions, as I understood it, and
19 I think the argument of the State of California and the
20 State of Kansas, who is also in this courtroom, was that
21 all of these cases ought to be reassigned. And the panel
22 said no, they didn't think so. They didn't think that the
23 fact that -- well, first, what they did, they reassigned
24 them. And then they said it might be well to add a few
25 words about the factors which had not influenced our decision.

1 And they pointed out that they were not influenced by the
2 State of California's argument. And I think that Your Honor
3 would like to have that opinion. And I would hand it up,
4 if I may.

5 But I would also point out that as it is sometimes
6 true, it is a little hard to know whether we should do as
7 the panel does or as the panel says. They did one thing
8 and said another. They might well have been looking down-
9 stream to this problem and decided they have had enough
10 trouble getting fine judges like yourself to come in and
11 handle the case without having to find two of them. So I
12 am sure they appreciate the problem.

13 But as I say, we are concerned about this, and as
14 we said in chambers, Your Honor, we feel that the fact that
15 Your Honor might decide that there are settling classes,
16 does not mean that you have to find that there are any
17 litigating classes because we all know that in the settlement
18 classes the corners are rounded off. That is what it is
19 all about. That is settlement. For example, when the Second
20 Circuit took the appeal from Judge Wyatt's order in the
21 antibiotic cases, where Judge Wyatt approved the settlement,
22 Judge Wyatt admitted, and the parties, in fact, admitted,
23 that \$3,000,000 was going to the wholesalers, and they had
24 actually made money if there were a conspiracy. But the
25 judge recognized, the parties recognized, that unless they

1 gave them that they weren't going to settle. The Court
 2 of Appeals recognized it. There is a lot of rounding off
 3 corners in settlement. And all of us recognize that. So
 4 our point is that a judge could well find settling classes.
 5 People want to get out for any number of reasons. That is
 6 up to them. And the Court should have a policy of dispos-
 7 ing, gladly disposing of litigants in that way.

8 But I hope that that doesn't mean that the Court
 9 would feel that, that the Court would then have to find
 10 litigating classes along the same way because I just don't
 11 think it follows. But it is a concern. It is a concern
 12 because we all know that it is very difficult at times to
 13 put on two hats and look at the settlement classes this
 14 way and at the litigating classes another way.

15 THE COURT: Mr. Raven, I don't think
 16 there is any possibility of being in any way influenced
 17 because I haven't read it. You tell me they have in this
 18 proposal classes for settlement. I didn't know that before
 19 because I haven't read the papers.

20 MR. RAVEN: I appreciate that, but
 21 I also appreciate that they did tell you about the Holly
 22 settlement. They told you about the amount.

23 THE COURT: That is all.

24 MR. RAVEN: I don't know what else.

25 THE COURT: That is all.

1 MR. RAVEN: And I know, of course,
 2 of Mr. Freeman's letter, and I am not suggesting Your
 3 Honor to do anything about this. But I think it would
 4 be unfair, and I hope Your Honor will not take it as
 5 untoward, the fact we get up and express our opinion on
 6 it. And we have to say we are concerned because I want
 7 to impress upon Your Honor we are very serious about these
 8 motions.

9 THE COURT: Not at all. I welcome
 10 anyone's full expression. If you consider that I am
 11 chargeable with some impropriety, I would not be offended
 12 at all. Now, if I were convinced that it was an impropriety --

13 MR. RAVEN: As we see it, Your Honor,
 14 you are not involved nor are we. You did not make this
 15 problem, nor did we, and I can't help -- I was chastised
 16 a little bit yesterday by the plaintiffs' attorney for
 17 saying something that I did not say. And I think I am
 18 going to chastise them just a little bit for doing some-
 19 thing they should not have done. But we are going to
 20 leave it up to Your Honor from there on.

21 THE COURT: Very well.

22 MR. FERGUSON: I might just say one
 23 thing. I am familiar with the Judge Wyatt situation. I
 24 was there. I argued the matter eventually before the
 25 panel when they did make the change, and it had nothing to

1 do with the fact that Judge Wyatt had also been the
2 settling judge. Judge Wyatt was just too busy, and he
3 took the litigating cases and had them for about a year
4 and a half after the settlement was reached. And he was
5 just too busy, and he wanted to leave. And we wanted to
6 get on with the show. So I hope Your Honor will take that
7 into account in connection with the --

8 MR. KIRKHAM: Your Honor, may I just
9 to clear the record, as we understand it in any event, the
10 letter addressed to you by Mr. Freeman, which I know you
11 will have read out of courtesy to Mr. Freeman, it says --

12 THE COURT: This is somewhat analogous
13 to the business of ruling on the objections to evidence
14 in a non-jury case. You have to read the exhibit to decide
15 whether you should read it.

16 MR. KIRKHAM: Certainly, of course,
17 Your Honor. And that does set out -- I was concerned with
18 your statement that, you know, defendants may have in any
19 way participated in conveying any information to the Court.
20 We think it is the plaintiffs that have done so, and it
21 does on Page 2 of that letter set out that the Holly --
22 I read, now,

23 "The Holly settlement provides for
24 establishment for purposes of four
25 classes..."

1 Spells them out,

2 "...deliberately excluded are
3 consumers."

4 And I think in fairness to the record that is a
5 letter, say, a six page letter.

6 THE COURT: I must have noticed
7 that, but frankly, I skimmed it so quickly I couldn't
8 be responsible for remembering anything that was in it
9 excepting that there was a proposed settlement.

10 MR. KIRKHAM: Your Honor, our concern,
11 of course, is as is appropriate, goes to appearances as
12 well as facts. And certainly that letter speaks for what
13 it speaks for. It is a six page letter, and I think in
14 fairness to this discussion, that it also ought to be part
15 of the record. And I do have a copy here. It may be made
16 a part of the record.

17 THE COURT: Yes.

18 MR. KIRKHAM: Thank you, Your Honor.
19 And I guess in addition, since it was also discussed, and
20 I was mindful, Your Honor, of your admonition that we work
21 out things ourselves, if we have any question and not bother
22 you as much as possible, I did not copy you quite deliberately
23 in my letter to Mr. Cooper. But it has been mentioned and
24 has now come up, and I think also in fairness to the record
25 that should be in the record, and you should look at it too.

1 It is a letter from me to Mr. Cooper of December 5th.

2 Both of those letters may be --

3 THE COURT: Yes.

4 MR. COOPER: Your Honor, just so the
5 record -- Josef Cooper, plaintiffs' -- the agenda which
6 was forwarded to Your Honor on December 4th or 3rd, I
7 believe, by Mr. Kirkham, did provide for an item on the
8 agenda relating to the scheduling of implementation and
9 submitting to the Court the proposed settlement. It was
10 not until after we had had the conversation and after
11 Mr. Kirkham had forwarded the agenda to you that I received
12 the letter that he just passed up to you.

13 MR. KIRKHAM: Well, that is not
14 inaccurate, and I wouldn't expect it to be inaccurate.
15 May I add something to make it complete, and that is there
16 was an item there that Joe and I, Mr. Cooper and I discussed
17 and said miscellaneous administrative matters. And
18 Mr. Raven and I and Mr. Cooper the night before met. We
19 agreed on an agenda, and that is where it was. Miscellaneous
20 administrative matters. The following day --

21 MR. RAVEN: I wasn't present at that
22 point. I wasn't there, because that agenda that I approved
23 had nothing about settlement on it.

24 MR. KIRKHAM: There was no such
25 discussion. Then the following day Mr. Cooper said, once

1 you get it typed up I want to take a look at it, which
2 would be perfectly normal. And then he said, we want to
3 put at the end there, this discussion of settlement. And,
4 you know, I can't stop you from talking. And if that is
5 what you are going to put in -- that was my view. And then
6 Bob said, well, you should make clear, as I say in my letter,
7 what I thought went without saying we should make clear.
8 And that is that we were not acquiescing. They can bring
9 up anything they want to in this Court and can file any
10 paper they want to, and we can take whatever position
11 appropriate vis a vis that matter.

12 MR. COOPER: That is correct. I
13 indicated to Mr. Kirkham, it was the day after the meeting
14 at which Mr. Raven attended. I simply indicated that we
15 wanted to put on a matter relating to scheduling and nothing
16 relating to substance. And it was at that time that
17 Mr. Kirkham agreed to include the matter on the agenda.
18 The agenda was submitted to you, and then I did receive
19 the letter from Mr. Kirkham. I just wanted the record to
20 reflect the sequence of events.

21 MR. RAVEN: There was nothing said
22 about the discussion when I was there, and I saw the
23 agenda the next morning, is what prompted me to relate, or
24 ask Mr. Kirkham to send that letter. Because I thought it
25 was very unusual that that couldn't have been handled under

1 administrative matters. That was my point, Mr. Cooper.

2 MR. COOPER: I think it was listed
3 under administrative matters, Your Honor, and the decision
4 to request that the schedule be submitted was not made by
5 the plaintiffs until the day after the meeting with
6 Mr. Raven.

7 MR. COCHRAN: Your Honor, again --

8 MR. RAVEN: May I just interrupt,
9 Mr. Cochran, with His Honor's permission, for one minute?

10 MR. COCHRAN: Some speeches are
11 improved by interruption.

12 MR. RAVEN: Your Honor, it seems to
13 me that we have come to the point where we should have
14 nothing further on this. We have made our position. We'
15 will leave it in Your Honor's hands. Your Honor has indicated
16 you are going to put that aside until you pass on this. And
17 I don't think, if Mr. Freeman has something to say that
18 is different, he is involved. But I don't think that other
19 members of the plaintiffs' committee that have not been in
20 communication with Your Honor on this can add anything into
21 this but get us into it deeper. I suggest that to Your Honor
22 for what it is worth.

23 THE COURT: Let me speak for a moment.
24 I am not going to take any action or make any ruling in
25 this matter until at least after the entry of the order on

1 class action. I had some question as to whether we should
2 put it on the agenda or not, but I thought that inasmuch
3 as it had been broadly bruited about by that time, that
4 it would be good for the soul if not for the litigation
5 for everything about it to be brought out into the open.

6 MR. RAVEN: I will withdraw my
7 comments. If any other defendant feels differently --
8 but for Amstar --

9 THE COURT: If there is anyone else
10 who believes that anything else about this matter ought
11 to be brought out in a factual statement, not argumentative
12 comments, I will permit him to speak. It is correct of
13 you, Mr. Raven, to tend to these matters that have been
14 added for the record. And if anybody else wants to add
15 something to the record, if it is not argumentative, you
16 may do so. All right.

17 MR. COCHRAN: Your Honor, the Court
18 has admonished me not to be argumentative. You have
19 emasculated me as a lawyer. I am going to address myself
20 very briefly. Much more articulate and competent counsel,
21 perhaps, than I will follow me. They are Mr. Frederick
22 Firth and Mr. Lee Freeman. I don't know in what particular
23 order they will appear, but they will articulate their
24 position on the settlement quote quote of the Holly, Union,
25 and C & H matter. I want the Court to know that your

1 Executive Steering Committee, appointed by this Court's
2 order, was not unanimous.

3 THE COURT: By the way, I want it
4 made plain, if it isn't already on the record, that I
5 never have appointed an executive committee or a Steering
6 Committee or whatever. I always believe, whether I have
7 the authority to do it, I think it is unwise to do it;
8 that the counsel involved should select their own leaders,
9 if they need leaders. So I have only approved what you
10 agreed upon.

11 MR. COCHRAN: And I happen to be a
12 member of that committee.

13 THE COURT: All right. Go ahead.

14 MR. COCHRAN: The unanimity is not
15 there, Your Honor. And all I think that I want to say to
16 this Court is that albeit I did acquiesce in the initial
17 Holly settlement because it tended to implement the
18 policies of the Court to, how shall I say, approve or at
19 least encourage settlements that I did not and as 42 per
20 cent my arithmetic points out of that Steering Committee
21 did not acquiesce in the subsequent settlements. And all
22 I am now urging is caution and consideration of this Court
23 to put these settlements, at least the Union and C & H on
24 the back burner until the Court determines the classes and
25 the dimensions of this litigation. And having done that,

1 then the class representatives are more properly able to
2 determine whether or not they will come to this Court and
3 urge upon the Court an acceptance of settlement as being
4 fair, reasonable, and adequate. And I will defer to
5 Mr. Freeman.

6 THE COURT: I have said that is what
7 I am going to do several times.

8 MR. COCHRAN: I am very, very, very
9 appreciative of being in the same position as the Court.

10 (Off the record)

11 MR. MADISON: My name is James
12 Madison, Your Honor, representing American Crystal Sugar
13 Company, dissolved, a Jersey corporation. My client, and
14 on behalf of my client, we would object to continuing
15 discussion of this settlement, notwithstanding Mr. Raven
16 withdrew his objection on behalf of Amstar, and the efforts
17 to continue the argument with respect to the class action
18 motion in the guise of a so-called factual discussion of
19 the settlement.

20 MR. FREEMAN: I agree with Mr. Madison.
21 And may I just make a few remarks, which I think are very
22 pertinent and which even Mr. Madison would agree on. I
23 don't think I can ever get Mr. Kohn's agreement to anything
24 I say, but I think I can get the defendants. I read your
25 message this morning loud and clear. It meant to me that

1 you were going to proceed in an orderly way to deal with
 2 the class issues on a litigated basis and appoint class
 3 representatives to those classes that you decided should
 4 be certified. I think in view of that statement, it is
 5 inappropriate for Mr. Ferguson to suggest that he is
 6 proceeding with a signing ceremony for C & H and the
 7 Consolidated Food Company alleged settlements. I don't
 8 think anything further should be done, including the
 9 inclusion of any signatures on any kind of document that
 10 he is pleased to call a settlement. I think that violates
 11 the statement that Your Honor made. I respect the
 12 embarrassment that is caused here by having submitted
 13 these papers, mine being an offender as well as the Holly
 14 settlement which was submitted. I respect Your Honor's
 15 desire to put all that aside. And I think it should be
 16 put aside at an appropriate time when the settlements
 17 come to your attention. I will then make the position of
 18 the people I represent very clear. And I speak now, I
 19 speak now for the states of and the attorneys general
 20 and their assistants of the following states: Arizona,
 21 California, Colorado, Oregon, Washington, Kansas, Illinois,
 22 Minnesota, and Wisconsin. Those nine states want to
 23 advise the Court that they object to the procedures that
 24 have been followed by whatever committees are named to
 25 now, that they notify the defendants, and we do so in open

1 Court, that we will not stand bound to any agreements that
 2 are reached that involved the government entities or the
 3 classes they seek to have certified, that the defendants
 4 will have to in the future, if they want to talk settlement
 5 with the government entities, states that I have mentioned,
 6 that they will have to talk with us directly and not through
 7 any other parties or any other representatives. I think
 8 yesterday's partial reply and filibuster by one of the
 9 illustrious attorneys in this room demonstrated the depth
 10 of our fear and concern and abuse that we have suffered as
 11 a result of this process.

12 So as far as the defendants are concerned, Holly
 13 included, they have reached no agreement with the states.
 14 And as far as the vote of the Steering Committee is
 15 concerned, Your Honor, it is a Steering Committee consisting
 16 mostly of what are pleased to be called industrial users,
 17 and that is kind of a stacked vote. In any event, I for
 18 one cannot agree with Mr. Ferguson's statement that the
 19 procedures have complied with the law or with the rules.
 20 I think we should put it all aside, and I think we should
 21 proceed with your determinations of the motions that are
 22 before you, not only the class action but the others, and
 23 we, the discovery committee, will proceed as promptly as
 24 possible with our discovery obligations.

25 I urge Your Honor to take the responsibility of

1 establishing the parameters of who can negotiate. And I
 2 think negotiations in the future, if there are any --
 3 and as far as we are concerned we will proceed with the
 4 litigation and with trial if necessary. Settlement is
 5 only an alternative to the elimination of a trial after
 6 you know what the facts are. We propose to get those
 7 facts in hand before we agree to any kind of a settlement.

8 I urge Your Honor somewhere along the line to take
 9 the responsibility of designating class representatives
 10 as the only parties that have the right to negotiate for
 11 their particular classes. And if the classes want to get
 12 together in a joint committee to negotiate jointly with
 13 some one or other, that, of course, is quite permissible
 14 and quite proper. I don't think that what has happened
 15 thus far influences Your Honor's impartiality. I think
 16 in all of these cases it is possible that a settlement can
 17 be achieved. If the figure is low enough, it always can
 18 be achieved, and it doesn't mean anything with respect to
 19 the merits of the classes. And I say this for Mr. Raven's
 20 benefit -- or the merits of the litigation. Thank you,
 21 Your Honor.

22 MR. RAVEN: If you want a trial, you
 23 can have one, here.

24 MR. FREEMAN: I want a trial, and
 25 I would love to have a trial with you.

1 MR. FIRTH: My name is Fred Firth,
 2 Your Honor. I represent some of the larger industrial
 3 users that have sued here and have stood up to be class
 4 representatives. And hopefully they will be. I am not
 5 on the executive committee, although I am on the Steering
 6 Committee. I believe I am not on the executive committee
 7 because I tend to take a little too much command of things,
 8 and so therefore they thought they didn't want me on it,
 9 which was all right. I appointed myself to the Firth
 10 Committee, Your Honor. I am the only member. Seriously,
 11 I have a couple of comments. The only way that I know
 12 that Your Honor could approve any settlements in this
 13 case would be on the facts. The only way that I know of
 14 to negotiate any settlements is based on the facts.

15 Now, when you have an executive committee where one
 16 member says that a settlement is so valuable and another
 17 member says exactly the opposite, the only way you can
 18 decide things are on the facts. And I respectfully submit
 19 to Your Honor, before you approve of any kind of schedule,
 20 that we number one have to have the facts. And the first
 21 fact we would have to have would be sales and market share.
 22 And we don't have those, and I don't care what anybody
 23 says later to Your Honor, the Steering Committee was
 24 mentioned, and the Steering Committee -- I just crossed
 25 examined executives just a little bit. If I had really

1 gone after them, I know I would have determined that they
2 don't have the facts. So I beg for the facts. And that
3 is why my vote was a no at this time on the C & H pending
4 the receipt of the facts. I am quite willing to go along
5 with Holly to get a little seed money, as you say.

6 THE COURT: Don't be quite so
7 argumentative, please.

8 MR. FIRTH: All right, let me slow
9 it down.

10 THE COURT: I asked you not to argue.

11 MR. FIRTH: Your Honor, what I
12 simply want to do is when and if the time ever comes when
13 Your Honor has to decide whether to approve or not to
14 approve a class settlement or any kind of settlement, Your
15 Honor would have to do it on the basis of the facts. I
16 want to make sure that I said today that I have reservations
17 about the settlements until we get to the point of getting
18 out all the facts. And I hope we are not going to be
19 foreclosed from discovery or whatever is necessary on that.

20 Further, Your Honor, I would urge Your Honor to
21 accept the principle that Judge Zerbolli accepted in the
22 gypsun case and really espoused, that we do not have any
23 representative attorney of any class who has any interest
24 in any other class, and that no attorney who seeks to be
25 a representative of a class or a sub-class has any fee

1 splitting arrangement with any other attorney in any other
2 class or sub-class. So that each attorney who is involved
3 in a class or a sub-class only has that class or sub-class
4 in mind. In other words, he isn't a part of this class
5 here clients, in this class clients, in this class clients,
6 in this class, and then he comes around to the point of
7 having to negotiate inter-class or to make different --
8 I hope Your Honor will adopt that principle when you come
9 to it.

10 Finally, I want to pick up on Mr. Raven's comments.
11 Your Honor will recall at the last pre-trial conference
12 that I suggested we follow a very novel procedure and set
13 a tentative trial date in such a big case. I think there
14 is only one reason why this case has gone along so well
15 as it has and counsel have been so cooperative in discovery.
16 And I think it is Your Honor. And I think it is the fact
17 that everybody in this room, in addition to being experienced,
18 knows that Your Honor is concerned and that Your Honor won't
19 tolerate any baloney. And Your Honor recalls at the last
20 hearing you said, Your Honor gave me permission to bring
21 up the question of a tentative trial date again at this
22 hearing. Now, Your Honor may well assign me to do that
23 at the next hearing, but I think, myself, that there is
24 nothing wrong with saying that we are looking down the pike
25 at a trial in the fall of '76 or in the spring of '77.

1 But that is when we are looking to it, and that is when
 2 you gentlemen ought to try to set your schedules. And I
 3 would just respectfully ask that Your Honor give a little
 4 consideration because I know it will speed things up.
 5 Thank you, Your Honor.

6 THE COURT: I can't imagine that any
 7 further comments would be of any value, but nevertheless
 8 if there is anyone who feels that he has some statement
 9 to make that has not been covered, I would be happy to
 10 have him do it. Very well, no one responds.

11 Now, let me say two or three things, and then we
 12 will be finished with this subject. I repeat now, again,
 13 what I have said two or three times previously, that as
 14 far as I am concerned I shall not inquire into, receive,
 15 or accept any information on the subject of these proposed
 16 settlements. I will make no ruling concerning the matter
 17 in any way whatever at least until such time as all counsel
 18 seek one or at least are available to participate in the
 19 matter before the ruling is made. This is just Horn Book,
 20 every day procedure, especially for one who has been a
 21 trial judge for many years and whose conduct, so far as I
 22 know, has never been questioned excepting in one instance
 23 here in San Francisco when I received criticism for moving
 24 too rapidly. And that may have been well taken, for all
 25 I know.

1 In any case, I want to tell you what my policy has
 2 been since I got on the bench, keeping in mind that I was
 3 an active trial lawyer, trying a variety of cases in not
 4 only my own district but elsewhere. So I had some under-
 5 standing about what a judge ought to be and do before I
 6 became one.

7 On the subject of settlement, my policy has always
 8 been, as I am sure some of you here already know, at some
 9 appropriate time, usually after the completion of discovery
 10 or, if not earlier, at the settlement of the final pre-trial
 11 order, to insist that the counsel assure me on their
 12 professional honor that settlement has been fully explored.
 13 If it is not, I insist that they undertake it. I don't,
 14 however, want to know anything about it excepting only
 15 to receive their assurances that they have fully and
 16 genuinely explored the subject. The reason for this is
 17 that it is my opinion that the presiding, trial judge owes
 18 to the litigants, not to the lawyers but to the litigants
 19 who are the ultimate persons concerned, an opportunity to
 20 consider the possibility of disposing of the case other
 21 than by trial. Apart from that, I will do nothing whatever
 22 about settlement unless the counsel for all parties agree,
 23 and then only as much or as little as all parties wish me
 24 to do.

25 Now, during my experience all over the country in

1 various jurisdictions, there are different thoughts on
 2 this subject by the judges and by the counsel. But I
 3 always apply my rule wherever I am. It happens, not
 4 frequently but on occasion, where all parties concerned
 5 come in and ask that I tell them what they should do. It
 6 doesn't happen often now. It was not infrequent, however,
 7 in former times, at least in the District of Columbia.
 8 On the other hand, you may all decide that you want me
 9 just to do some particular thing that might be helpful.
 10 None of you need have the slightest concern that I am ever
 11 going to do anything more than just that. And I have not
 12 done any more than that in this instance up to now. As
 13 far as I am concerned, unless there are some of you who
 14 feel that I should take some other action, the subject is
 15 closed. If, however, any of you conclude that I should
 16 do something more either with respect of my own status or
 17 in any other respect, you will be free to take it up with
 18 your adversaries, and if you can agree on something that
 19 you want me to do, I will do it. Otherwise, I will not.
 20
 21 MR. FERGUSON: Thank you, Your Honor.
 22 THE COURT: It was nice to see you
 23 all.

(The Court was thereupon adjourned)

C E R T I F I C A T E

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 5 I, ELINOR A. HOLLOWAY, Official Reporter
 6 of the United States District Court at Tacoma, Washington,
 7 do hereby certify:

8 That the foregoing transcript constitutes
 9 a true, full and correct transcript of my shorthand notes
 10 taken as such Official Reporter of the proceedings
 11 hereinbefore entitled and reduced to typewriting to the
 12 best of my ability.

13 Dated this ____ day of December, 1975.

14
 15
 16 _____
 17 ELINOR A. HOLLOWAY
 18
 19
 20
 21
 22
 23
 24
 25

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3

4 IN RE: SUGAR ANTITRUST LITIGATION
5

6 MDL: 201
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9 PRETRIAL HEARING
10 AUGUST 16 & 17, 1970
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21 BEFORE THE HONORABLE GEORGE W. BOLDT, Presiding
22
23
24
25

1 HEARING IN CHAMBERS

2 attended by

3 THE COURT, PLAINTIFFS & DEFENDANTS' STEERING COMMITTEES
4

5 THE COURT: I think the first thing
6 that we should settle is an agenda for the day, consolidate
7 it, and state in whatever order you gentlemen suggest.

8 One thing that I would like to suggest in
9 connection with it that we should try to get all of the
10 matters that are likely to be short; that is, to take
11 very little time, on first. I notice in the memorandum
12 that I was refreshing myself on as I came up again this
13 morning, that there are two or three matters that probably
14 will not be argued at all, but ruled on the memoranda.

15 MR. RAVEN: That's right, Your Honor.

16 THE COURT: For example, Imperial
17 has indicated that they do not care to argue it, and so
18 on. So why don't you take a look at them now in the light
19 of that and come up with whatever you may agree upon as
20 a proper agenda.

21 MR. FERGUSON: Let me see if I under-
22 stand. Is Your Honor's feeling that the shortest things
23 should come up first?

24 THE COURT: That's right.

25 MR. FERGUSON: If you are doing it

1 that way, I would suggest we have some agreed orders that
2 we should put in, then. We can present them first.

3 THE COURT: Agreed orders.

4 MR. FERGUSON: No. 1.

5 California Beet Growers Associate matter document
6 production, No. 5 on the Defendant's agenda and No. 3 on the
7 Plaintiff's agenda.

8 THE COURT: Yes.

9 MR. KOHN: And the second part of that
10 would be the Amstar motion No. 6 on the Defendant's agenda
11 and No. 4 on the Plaintiff's agenda.

12 MR. RAVEN: We had a report on the
13 efforts to dispose of the Nord and Tancredi matter which we
14 will fill in shortly.

15 MR. FERGUSON: No. 2, Tancredi?

16 THE COURT: Are you still on those
17 on which there is no occasion for any argument?

18 MR. RAVEN: Right.

19 MR. FERGUSON: Right.

20 MR. RAVEN: Those two motions to amend.
21 Of course, the defendants as such, the group of us, we
22 aren't involved in that. I do understand from John Jeffers
23 who is here today out in the courtroom, it is my understanding
24 at least this morning, he wanted to proceed. He want to
25 proceed with his motion. Is that your understanding?

1-5

1 MR. KIRKHAM: He was prepared to speak.

2 I really didn't have --

3 MR. FERGUSON: Let me tell you, Your
4 Honor, the plaintiffs' motions, these are the plaintiffs'
5 motions.

6 THE COURT: Excuse me. Does that
7 include the motion of California to amend their complaint,
8 and so forth?

9 MR. FERGUSON: No.

10 THE COURT: That is a matter that they
11 say in their memoranda that they are agreeable to arguing
12 but will not insist on. I intend to rule on that without
13 any argument.

14 MR. KOHN: That is the State of
15 California's motion?

16 THE COURT: Yes.

17 MR. FERGUSON: Today or at some other
18 time.

19 MR. LANG: Bailey Lang. I am prepared
20 to argue. If the State wants to rest on its motion papers,
21 I am certainly content to do so. I didn't bring my brief-
22 case, it is in the courtroom.

23 THE COURT: I have them here. I can
24 pick them up quickly. I want to be sure, here, and you are
25 correct. The plaintiff, State of California, is prepared

1 to present oral arguments if the Court so desires, but
2 does not request a hearing in the matter.

3 There will be no argument.

4 MR. FERGUSON: We don't put it on the
5 agenda?

6 THE COURT: List it on the agenda.

7 MR. RAVEN: As submitted.

8 MR. FERGUSON: No. 3 with no argument.

9 Then No. 4. We will get to Imperial and Sucrets. And I
10 would like to state the plaintiffs' motion.

11 THE COURT: All right.

12 MR. FERGUSON: The plaintiffs made
13 these motions to amend. We contemplated noting it for
14 hearing at this pretrial conference. Then we received,
15 about a week ago, from the Panel an order to show cause.
16 Now, it so happens in connection with the order to show
17 cause that we have to take a position. And we are going
18 the plaintiffs' steering committee has resolved its
19 position that it appears to us that the action of the
20 Panel, if and when they send the eastern cases, any of
21 them, out here, it is going to have an effect on both
22 the Sucrets and the Imperial motions.

23 So therefore, we feel that because of the Panel's
24 show cause and the fact the Panel had this matter under
25 consideration, that it is premature to bring these motions

1-7.

1 on for hearing at this time. There is a second area. For
2 that reason, they should not be heard, although I think the
3 primary reason is sufficient. The non-settling defendants
4 have said that if these two amendments to the motion to
5 amend are granted and they are joined as defendants, then
6 this would have an effect upon the notice and the settlement.

7 And so, in the light of that, also, we say that
8 this is not the proper time to bring those on, and all of
9 the things that will have to be done in connection with
10 Sucrets and Imperial will have to be done in connection
11 with the other. So we just feel it is premature and they
12 should be omitted from the agenda. That is why we omitted
13 them.

14 THE COURT: How do you feel about it,
15 Mr. Kirkham?

16 MR. KIRKHAM: Counsel for Imperial is
17 here, I know for sure. I think that really it is a matter
18 for him to respond to in part. As far as our position goes,
19 again I feel a bit uncomfortable articulating a position
20 from solely the point of view of the only company I can
21 represent without having the other counsel present. I know
22 of no reason why my position might be inconsistent. Certain-
23 ly, if plaintiffs think that Imperial and Sucrets at one
24 point were appropriate as defendants, then we say, "Hey,
25 shouldn't you tell the class about that?" And then they

1 say, "Gee whiz, we wouldn't have them as defendants right
 2 now." It seems to me that the plaintiffs are either
 3 improperly presenting their class representations by
 4 saying yes, here are two appropriate defendants, but
 5 since this kind of gets in the way of our giving notice
 6 right now, we will mention them for the moment or else,
 7 you know, they are in effect -- well, it is really all
 8 one point that they can't kind of have their cake on the
 9 notice and eat it, too. But I think that this is a matter
 10 which I can very briefly state my position on, Your Honor.
 11 I don't think it needs elaborate argument. It is just
 12 right there on the table. I would like, then, my co-defen-
 13 dants to have the opportunity to either disavow what I say
 14 or elaborate on it and so forth.

15 THE COURT: I will state now to you
 16 and repeat to all counsel when I take the bench substantially
 17 as follows: This litigation is now more than a year and
 18 a half old. The class action motion was filed as promptly
 19 as possible, and the order was lodged months ago. Everybody
 20 that has anything to say about class action has been given
 21 a full and fair opportunity with the possible exception
 22 of Imperial, who makes a considerable point of their
 23 assertion that they have not had an opportunity. But other
 24 than that, everybody else has. I think actually, they have,
 25 too. We will hear from them, however, about that if they

1 want to be heard on it. Therefore, I propose to settle
 2 everything on this line, if it takes all summer or fall,
 3 today, at this hearing. Everybody that wants to be heard
 4 further in connection with either the order, the notice,
 5 any phase of it, we are going to do it at this hearing.
 6 And if that appears to be voluminous or time consuming,
 7 we will carry over into tomorrow and finish it. I think
 8 probably it would be desirable to leave it to the last
 9 matter on the list so that if by the time we finish
 10 everything else it looks doubtful that we are going to
 11 be able to finish class action today. We will start
 12 in the morning when we are all fresh and ready to give
 13 full attention to it.

14 Now, I hope that you all agree with that. But
 15 I must say, whether you do or not, that is what we are
 16 going to do.

17 MR. RAVEN: Well --

18 MR. FERGUSON: That is clear enough.

19 THE COURT: That is all I want to know.

20 MR. RAVEN: We will be given an
 21 opportunity to argue as to why we think it is premature at
 22 this time?

23 THE COURT: Of course.

24 MR. RAVEN: I am going to do it as if
 25 I could turn you around on it.

1 THE COURT: I just want you to know
2 what I am thinking about. When I was a lawyer at the bar
3 and the judge told me what was in his mind, I always
4 appreciated it. Then you have some basis to operate. But
5 if a judge sits on the bench and never mentions anything,
6 you are likely to spend all of your time on a point you
7 have already won.

8 MR. RAVEN: And you might stand there
9 and lose it.

10 THE COURT: That is my view of it, and
11 that is the way I want to proceed in setting up this agenda.

12 MR. RAVEN: If I didn't think I had
13 such a good argument, I would think I was in trouble on
14 this one.

15 MR. FERGUSON: Your Honor, I don't think
16 we need any clarification on your order.

17 THE COURT: Go ahead.

18 MR. FERGUSON: We put Sucrets and
19 Imperial in there and let everybody say whatever they want
20 to about it.

21 THE COURT: Yes.

22 MR. FERGUSON: Then the next thing --

23 MR. COOPER: The Sucrets matter may be
24 more extensive, depending on whatever counsel wants to say,
25 specifically clarification of the class action order relating

1 to your memorandum of July 30, and the draft of a supplemen-
2 tal order we can dispose of before that.

3 MR. RAVEN: Although it fits in better
4 with the argument on defense --

5 MR. FERGUSON: I think that fits in
6 better. Let's keep all those things together.

7 MR. RAVEN: Those are the two biggest
8 items we have left. That is No. 2 on defendant's agenda.

9 MR. FERGUSON: We decided we would take
10 up these other items, so if we take up the clarification of
11 the first item on the agenda after Sucrets and Imperial
12 clarification of July 30 -- now, does that bring us down
13 to the question of whether or not the defendants have some
14 objections?

15 MR. COOPER: No. 1 on both agendas.

16 MR. RAVEN: We approach it a little
17 bit differently, a little bit different viewpoint.

18 MR. FERGUSON: We suggest we hit it
19 head-on.

20 MR. COOPER: There is one other matter
21 which is not specifically listed that I guess should be
22 considered. That is the question of the application of
23 the order to the Montana and Nevada classes. The defendants
24 filed a memorandum on that, and it is my understanding from
25 the attorneys of Nevada and Montana that they have prepared

1 a reply. I don't know whether the Court or anyone has seen
2 it.

3 MR. RAVEN: We haven't seen it.

4 MR. LANG: I got on in the mail this
5 morning from Montana.

6 MR. COOPER: I would suggest even before
7 we start the agreed-to matters we can make sure that everyone
8 has those memoranda, so by the time we get to it on the
9 agenda, they have had an opportunity to review them. We
10 might take it up in connection with 5 or 6.

11 MR. RAVEN: They would have to go back
12 in our office. Apparently it is in the morning mail.

13 MR. COOPER: They may have a copy of
14 it and can give it to you. I am sure since it is now
15 11 o'clock, we won't reach that matter on the agenda
16 probably until afternoon.

17 THE COURT: All right. We are going
18 to put it down as No. 6 then; is that it?

19 MR. COOPER: That would be part of Nos.
20 5 and 6, part of the question of the class action order.

21 MR. FERGUSON: Really clarification of
22 July 30 and Montana and Nevada.

23 THE COURT: Yes.

24 MR. COOPER: Except that we did not
25 cover it in the suggested order of July 30 except to put it

1 in the briefing schedule.

2 THE COURT: All right. What is the
3 next one?

4 MR. FERGUSON: Then we would have what
5 we had at No. 1, A, B, and C, and what the defendants have
6 as their No. 1, which is their objection to our lodging the
7 settlement agreements, lodging the notices. I might say,
8 Your Honor, because the defendants felt that our notice
9 contained matters relating to the settlement, the defendants
10 asked us not to lodge these until we had a chance to see
11 you face to face.

12 THE COURT: I have not seen them or
13 heard anything about them.

14 MR. FERGUSON: Neither the defendants
15 or the plaintiffs have submitted you the forms of notice.
16 They do contain a combination of class action notice, and
17 settlement, and proposed dates, suggested dates for opt out
18 and for settlement hearing. So these are things that I think
19 we should take up all at the same time. And at the same time,
20 I have a letter to submit, the forms of settlement, agreements
21 and forms of notices and so forth.

22 THE COURT: Probably then that will fit
23 with the general subject of class action.

24 MR. RAVEN: I think that is the last
25 big item, and I would suggest this: Even the two (1)'s on

1 both agendas go together, but ours really is the threshold
2 question of whether or not the whole matter should be
3 considered at this time. Your Honor has indicated that
4 unless I make a very persuasive argument you are probably
5 going to rule against us. I would like to make my argument.

6 THE COURT: I will not lock my mind.

7 MR. RAVEN: I know you are going to
8 listen to it. I know that.

9 THE COURT: I want to consider things
10 that you tell me that might change my view.

11 MR. RAVEN: If you should maintain your
12 view on that, it would seem to me we then go to items that
13 Mr. Ferguson and Mr. Cooper suggested. But that is the
14 logical flow, is it not?

15 MR. COOPER: I think so, if we take
16 (1) on the defendants agenda and then when we get through,
17 go to No. (1) on the plaintiff's agenda.

18 THE COURT: All right, the way I list
19 these according to my hasty notes, agreed orders as Item 1,
20 and under that we have three items, the California Beet
21 Growers matter, the Amstar v. Ray Fuchs thing, and the
22 Tancredi matter or something of that kind. I didn't quite
23 catch it.

24 MR. FERGUSON: That is really No. 2,
25 the Tancredi report.

1 MR. RAVEN: That is very short.

2 THE COURT: All right, and then the
3 next item is 2, which is the California motion to amend,
4 no argument.

5 MR. FERGUSON: That's right.

6 THE COURT: 3, Sucrets and so forth.
7 And you suggested that be delayed because the Panel is
8 considering --

9 MR. FERGUSON: Sending the Sucrets
10 matter.

11 THE COURT: -- sending some of all of
12 the eastern cases to us, so it will be a single consolidated
13 litigation with possibly one or two exceptions. That is
14 the third thing.

15 The fourth thing, anything Imperial wishes to say
16 in addition to what it has already said in its memorandum.

17 And five would be the clarification of the class
18 action order, and that is a matter that should be just a
19 very few things that are not more than purely errors of one
20 kind or another, and so on.

21 MR. FERGUSON: We have an order that we
22 presented, Your Honor.

23 THE COURT: Yes, I saw it. And that
24 would include the Montana-Nevada thing, would it?

25 MR. RAVEN: Your Honor, I am sorry. On

1 that clarification of the July order, has Your Honor received
2 a letter from Mr. Kohn on it?

3 THE COURT: Not that I am aware of.

4 MR. RAVEN: He sent a letter where he
5 raised a series of questions.

6 MR. FERGUSON: Very similar to my letter.
7 I don't know if you have received my letter. It is very
8 similar. He asks what the situation was. We have supplemen-
9 ted that because I am going to be able to report to the
10 Court what the plaintiffs' steering committee did in
11 connection with this. And I think it clarifies all the
12 letters.

13 MR. RAVEN: Without being entirely
14 facetious, I think the defendants have some interest in how
15 that is done and what the principles are.

16 THE COURT: In the first place, let's
17 put everything under the heading of clarification. We know
18 one is the class action. Now, if you have some other
19 clarification anywhere along the line, let's take them
20 and add them under that heading.

21 MR. RAVEN: I think the first one, Your
22 Honor, is really that section five of the proposed order,
23 which deals with your order where you say that on class
24 representative, that the class must show -- meet two require-
25 ments; one, that it has not been a representative of another

1 class nor its counsel been representative of another class.
2 And all of the parties, the plaintiffs and defendants, have
3 felt there are some ambiguities in Mr. Kohn's letter, which
4 asked repeating. Mr. Kohn's letter which asked a series
5 of questions. I got a letter handed to me by the Clerk
6 as I came in from Mr. Freeman saying he thought it should
7 be clarified so as not to preclude governmental agencies.

8 THE COURT: Yes, it is here somewhere.
9 You can just take it. It is a very short letter. Okay,
10 we will put that under the heading of clarification. And
11 whatever you want to do with it, whoever wants to speak to
12 it can. If nobody cares to speak against it, I will work up
13 some single sentence clarifying it as he desires. Otherwise,
14 if there are those who oppose that, I will hear about it.

15 MR. FERGUSON: I think that clarification
16 is really the wrong word in this particular instance. I
17 think the problem that a number of plaintiffs were confronted
18 with is a situation where they were riding two or more
19 horses. It created a bit of a problem. We had no way of
20 getting together and ironing it out prior to this pretrial
21 conference. And except we had the matter yesterday and we
22 took the time yesterday to try to go into this thing, I think
23 we have resolved it satisfactorily. I think the answer is
24 simple. I think Your Honor laid out a formula that makes
25 sense, and we have been trying to study allocation of these

1 monies between various plaintiffs. And we find problems that
 2 we would have discovered down the line if Your Honor hadn't
 3 in his wisdom seen this problem. So I think you have done
 4 us all a favor by bringing it out in the open at this time.
 5 And I think that there are some ground rules that we can
 6 live with. I think there may be, Mr. Freeman may be in a
 7 different position than other plaintiffs. I can't find in
 8 looking at it any conflict between the states. I can find
 9 conflict between every other class plaintiff, but I can't
 10 find any between states. So if there isn't any conflict,
 11 we probably shouldn't go out of the way to create problems.

12 MR. RAVEN: I would want to say this,
 13 though, Judge Boldt. We are not going to reargue our points
 14 on who should represent the class. We have had ample
 15 argument and Your Honor has ruled on that. But, Your Honor,
 16 we think quite properly you have added in this last order of
 17 July 30 some guidelines. There are some ambiguities that all
 18 parties have appreciated. We think we are entitled to know
 19 the Court's principles. We don't think it is enough to let
 20 the plaintiffs know. They don't have any delegation of
 21 authority from you to decide that issue. We will want to
 22 know exactly what is involved.

23 MR. FERGUSON: I think the Court told us
 24 what his views were, and the only thing is that here is a
 25 percentage of plaintiffs who didn't like it.

1 MR. RAVEN: You, yourself, admitted in
 2 your letter, as I did in mine, as Freeman has done, Kohn
 3 has in his letter, that people look at it differently.
 4 What does class mean, subclass, and a whole series of
 5 questions that Kohn put in his letter, and if his honor
 6 doesn't have the letter, I think we ought to give it to him.
 7 It brings up the ambiguities.

8 MR. FERGUSON: As I say, I don't think
 9 it is ambiguous at all. The problem is it puts a lot of
 10 people in a difficult position. We have resolved the
 11 difficulties.

12 MR. RAVEN: You have, but I don't think
 13 the plaintiffs' counsel can resolve that.

14 MR. FERGUSON: We are not trying to do
 15 that. We are trying to comply with the Court's order. And
 16 all we are saying is that people who had their oxen gored,
 17 said all right, we can live with it. We will live with it.
 18 The Judge has said we will live with it. Now, I do think
 19 clarification is the wrong word. I think we are going to
 20 live with it.

21 THE COURT: Put it on the list. We
 22 can't keep all the people sitting out there unnecessarily.
 23 Just put it wherever you think appropriate on the list.
 24 I would suppose that it could be another heading. Instead
 25 of using the word "clarification", use some other word, if

1 semantics bothers you.

2 MR. FERGUSON: Supplemental order.

3 THE COURT: No. 6.

4 MR. COOPER: Supplemental order. This
5 is the only matter on the supplemental order that is noted.

6 THE COURT: All right.

7 MR. COOPER: If you did not receive Mr.
8 Kohn's letter, here is a copy.

9 THE COURT: I don't know why I did not
10 receive it. It is dated August 11. But I do not have it.
11 I will read it. It is short.

12 Now, why don't you do this. I think everyone
13 would like to have a copy or know what the order of business
14 is. Why don't you go out and quickly run one off and we
15 will send something out to get it Xeroxed and distributed.

16 MR. COOPER: I am trying to think where
17 we could get --

18 MR. RAVEN: We could caucus, Your Honor.

19 THE COURT: And everyone make notes as
20 best they can. All right, it seems to me that in all
21 likelihood, these matters, now, will better be attended to
22 in a two-day session. I am not going to make the ruling
23 about it now, but I am going to reserve a room, which I
24 hadn't done. I hoped that we might be able to return this
25 evening. But it was scheduled for a two-day meeting, and I

1 am going to announce that now so that everybody will
2 understand that the probability is that we will conclude
3 somewhere around 5 o'clock. And if at that time everyone
4 wants to stay here until midnight, it is all right with me.
5 But that is the equivalent of staying overnight. But I
6 want to go along with whatever seems to be most agreeable
7 to all concerned.

8 Very well, if you will do that, then, I will
9 just wait a few minutes and then you let me know when you
10 are ready for me to come out.

11 Thank you.

12 MR. LANG: Thank you.

13 (The in-chambers conference
14 was thereupon adjourned.)
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1 MORNING SESSION

2 (PROCEEDINGS OF AUGUST 16, 1976.)

3 THE COURT: I want to introduce you to
4 my Law Clerk when he comes in. He is trying to get a room
5 for me tonight someplace. He will be in shortly.

6 I was quite well satisfied to have our discussions
7 in chambers reported. I am afraid you are going to think it
8 was a waste of time because we have been discussing primarily
9 the agenda and the order in which we should approach it. I
10 think that everyone concerned is satisfied with the order
11 in which the matters will be presented. I made one statement
12 to the gentlemen that appeared to shock some of them and
13 not others. I will repeat it.

14 Rule 23 provides that class action shall be
15 determined at the earliest practicable time. The litigation
16 now is more than a year and a half down the road, and during
17 that time the oral argument on class action has been
18 presented, the Court drafted and filed a class action order,
19 with leave for anyone concerned to suggest errors or additions
20 or deletions and the like. This has consumed months. And as
21 of now, the subject has been thoroughly gone over. And it
22 seems to me that at this session of the Court, which probably
23 now will have to go into tomorrow, everyone that has anything
24 to say about class action or the notice or anything else
25 should have a final opportunity to present whatever views

1 they have, whether they have been briefed or not. It is an
2 open field day for comments, not duplicating prior contentions
3 and arguments. As far as those are concerned, I think that
4 I will not permit any further arguments about matters on
5 which I spent many hours and much thought in the review of
6 dozens and dozens of authorities. And to go on endlessly
7 permitting people to raise such matters, no matter how
8 erroneous you think they all are, would be wasteful. I
9 have pretty well settled that I think they are proper and
10 appropriate to this litigation. We will put the class
11 action and all matters relating to it directly as a last
12 item on the agenda. We will try to dispose of the matters
13 that are briefed in presentation or not to be argued at all
14 and enter the orders that are now ready for entry.

15 I hope that we can conclude all other matters
16 at a reasonable hour this afternoon, then return in the
17 morning with nothing but class action to talk about, so
18 that everybody will be fresh and ready to present his or her
19 views fully.

20 Now, having said that, I am not going to close
21 my mind, especially to Mr. Raven here, who was the most
22 shocked and fearful that I will not listen to what he has
23 to say about that. But I just want to let him know that he
24 will have to be pretty persuasive if there is going to be
25 any appreciable delay in getting on with the determination

1 of the class action.

2 When I was an advocate, I was very pleased with
3 the judge who would tell me what was going through his mind,
4 so it would give me a chance to correct him.

5 MR. RAVEN: I appreciate it, Your Honor.
6 I wish you had been a little less definite, but I still
7 appreciate it.

8 THE COURT: Very well. Let us start
9 the agenda. The first items are the agreed orders to be
10 presented.

11 MR. RAVEN: Your Honor, we have the
12 agreed orders here. The first one, which I believe, if we
13 have our numbers right, would become pretrial order number
14 one -- I am sorry, ten. This deals with the production of
15 documents by the California Beet Growers Association. It
16 has been approved as to form by Mr. Morris, the attorney
17 for the California Beet Growers, and Mr. Ferguson for the
18 plaintiffs and myself for the defendants. And I will hand
19 that up, if I may.

20 THE COURT: Thank you.

21 MR. RAVEN: The second one, Your Honor,
22 would be pretrial order number eleven. It is an order
23 granting the request of your colleague, Judge Ward, in the
24 Southern District of New York, ordering Amstar to produce
25 the Helzinga (phonetic) affidavit that was filed in this

1 action in the Fuchs case, which is pending before him. That
2 has been approved as to form by Mr. Ferguson and by myself.
3 I will hand that up.

4 I think the third item, Your Honor, we can deal
5 with very quickly. And that is the status report on the
6 Nord-Tancredi matter. If Your Honor recalls, our clients,
7 and not only defendants' clients, but the plaintiffs' clients,
8 from one shore, from the Pacific shore to the Atlantic shore
9 have been receiving some out-and-out solicitations. And
10 Your Honor wanted us to look into it. And we finally served

11 --

12 THE COURT: Can you suspend for just
13 a moment? The two orders previously referred to have now
14 been signed and shall be entered forthwith.

15 Thank you.

16 MR. RAVEN: Thank you, Your Honor.
17 We now have succeeded in serving both Nord and Tancredi.
18 They are represented by counsel. Their counsel wanted to
19 put the matter over. We agreed to, and the deposition will
20 be taken in Los Angeles on September 1. So all that have
21 questions, I invite them to participate.

22 MR. FERGUSON: Your Honor, I might say
23 that it has been quite an effort finding these people. They
24 have been hiding out. We had them staked out. We have had
25 all kinds of problems getting service. Process servers

1 thrown out -- but we finally got them served.

2 THE COURT: Good. Now, the next matter.

3 MR. FERGUSON: The next matter is the
4 California leave to amend, and I think Your Honor has --

5 THE COURT: The movant indicated in
6 his papers that he did not desire to present oral argument,
7 so that matter is submitted on the memoranda.

8 MR. LIGHT: Your Honor, if I could say
9 a few comments, I would like to do so.

10 THE COURT: Very well.

11 MR. LIGHT: Richard Light, State of
12 California. Just to clear the matter up, Your Honor, I
13 hope to allow for the Court to decide the matter before
14 a pretrial conference if it so desires. Since it has now
15 been decided, I would like to say just a few things. And
16 I think there has been a development here which is perhaps
17 somewhat -- the thrust of the amendment which we are seeking
18 is to add a fourth cause of action under the California
19 Business & Professional Code, Section 321, which essentially
20 is the parens patriae type of provision. It allows the
21 Attorney General to sue on behalf of consumers who have been
22 damaged or injured by violations of law.

23 The defendants do not claim that they are preju-
24 diced by the proposed amendment, but they claim that it would
25 be futile to add it, since under the Ninth Circuit Decision

1 in the State of California v. Frito-Lay, there can be no
2 parens patriae in Federal Anti-Trust Laws. I have a few
3 points I would like to make in rebuttal.

4 First, I really think that the merits of the
5 amendment are beside the point, that prejudice should be
6 the real issue.

7 Two, in our second cause of action, we already
8 have a common law of parens patriae cause of action. So
9 the issue of parens patriae will be before the Court anyway,
10 and to add it by statute under the fourth cause of action
11 would not be of significant dimension.

12 Three, there is no federal equivalent to a
13 parens patriae cause of action under Section 321. And
14 therefore, you cannot say that the cause of action arises
15 under federal law. There is no such law. It has to arise
16 from the state law. And the Frito-Lay decision cannot
17 logically apply. And I point out lastly the defendants
18 themselves at one point in this litigation have argued that
19 for some purposes, anyway, the California action does arise
20 under state law. It did so for the purpose of establishing
21 original jurisdiction in state court. Thank you, Your Honor.

22 THE COURT: You are welcome.

23 MR. LANG: Your Honor, I don't know if
24 you wish to hear a response. I had not expected Mr. Light
25 to argue.

1 THE COURT: Please be brief.

2 MR. LANG: I will be brief. I would
3 say only that under the circumstances, without going into
4 the merits of whether an amendment should be permitted,
5 it seems to me that since Your Honor has certified the
6 decision against remand to the Ninth Circuit, since the
7 State of California has filed application for leave to
8 appeal, that we have presented now to the Ninth Circuit
9 an important issue of law which they should be allowed
10 to decide without the confusion of changing the underlying
11 documents and situation before they have had a chance to
12 rule.

13 THE COURT: I think counsel for the
14 movant agrees, whether that is stated as expressly in the
15 memoranda or not. I won't take the time to run through it.
16 I read it again this morning. It is a matter within the
17 discretion of the Court. A belated amendment or even non-
18 belated amendment are clearly a matter for the Court's
19 discretion. I do not intend to expatiate on the subject,
20 but I have no doubt in my mind at all but that I should
21 exercise my discretion by denying the application.

22 So ordered.

23 MR. FERGUSON: Your Honor, the next
24 matter on the agenda is the Sucrets and Imperial motions.
25 Those were originally -- those are the plaintiffs' motions,

1 and the plaintiffs, in view of the fact that the Judicial
2 Panel has come down with an order to show cause why a number
3 of eastern cases, including these defendants, indicates in
4 some of the cases -- shouldn't be sent out here. We now
5 feel it is premature to argue these motions at this time,
6 that the result of the Panel's actions could have some
7 substantial effect on where we go from here. Adding at
8 this time might cause more confusion and do more harm
9 than good. So we state it is premature to argue this.
10 And we would like to have the motions remain as they are,
11 pending the decision of the Panel. And we would bring
12 them on as promptly, as soon as the Panel has acted.

13 THE COURT: Does anyone, who feels
14 to the contrary, wish to express a view to that effect?

15 MR. JEFFERS: May I be heard for just
16 a moment, Your Honor?

17 THE COURT: Yes, you may.

18 MR. JEFFERS: I am John Jeffers,
19 Houston, Texas. I represent the Imperial Sugar Company
20 of Sugarland, Texas.

21 THE COURT: Are you speaking to the
22 Sucrets matter?

23 MR. JEFFERS: Not the Sucrets matter.

24 THE COURT: Was there anyone opposing --

25 MR. JEFFERS: I thought we were speaking

1 to both, I am sorry.

2 MR. FERGUSON: I was speaking of both
3 of them.

4 THE COURT: Very well, go ahead.

5 MR. JEFFERS: I just wanted to make my
6 position clear. The position of the Imperial Sugar Company
7 is that we have been prejudiced by this motion to add us as
8 a party defendant because we have not been heard on the
9 vital class action issues. And it is the proposal of the
10 plaintiffs to withdraw, in effect withdraw the motion to
11 add Imperial for the timebeing. And if it is the disposition
12 of the Court to take that motion off the calendar this
13 morning, I won't go into the merits of the motion. But I
14 just wanted to make a record that our position is that we
15 are being prejudiced by the resolution of class action
16 issues before we have been heard. And that if the motion
17 is deferred, motion to add us as defendants is deferred, it
18 will simply defer the prejudice.

19 Mr. Ferguson has filed just recently a reply
20 memorandum in which he suggested that the motion to add
21 Imperial be taken off the calendar pending the action by
22 the multi-district panel. And yet his forms of notice that
23 he wants to be resolved immediately continue to reflect
24 Imperial Sugar Company as a defendant in the cases.

25 We have not been heard on the form of the notice or

1 had an opportunity to have input on that any more than we
2 have been heard on the class action issues. So our position
3 will be if the motion is deferred, it will just defer the
4 prejudice. I don't see that the dependency of eastern cases
5 or the matter of the eastern cases has any bearing particu-
6 larly on Imperial because, except for the few cases just
7 recently filed which named everyone as defendants, including
8 Imperial, we have not previously been involved in the eastern
9 cases. We don't sell sugar in the east. So I don't under-
10 stand what connection there is between eastern cases and
11 the motion to join Imperial. So I say, I just want to make
12 my position clear. I feel like we will be further prejudiced
13 if the motion is deferred. But if the Court's disposition is
14 to withdraw the motion from the calendar for the timebeing
15 as plaintiff suggests, I don't suppose I should go into the
16 merits of the motion at this moment, though I am prepared to
17 do so.

18 MR. FERGUSON: Your Honor, if there
19 is anything in the notice when we discuss the notice later
20 today or tomorrow that is improper as far as Imperial is
21 concerned, it can be stricken. Imperial is in an unusual
22 position. They were a defendant in a very few cases at
23 the time of the class action hearings. Their local counsel
24 here, of course, participated for another defendant in the
25 class action hearings. Where they stood and where they do

1 stand on that is something I am not clear about. But all
 2 I can say is if there is anything they object to in the
 3 class action notice that is improper, the time to take it
 4 up is when we are discussing the class action notice,
 5 which is to be later on today or tomorrow. I think to
 6 that extend we can clear up your problem. I do believe
 7 it is premature to hear this at this time.

8 MR. JEFFERS: Are you suggesting that
 9 you delete the reference to Imperial?

10 MR. FERGUSON: I don't have the
 11 references here before me. I presume you will stay here
 12 and we can discuss it.

13 THE COURT: I will direct you to stay
 14 until the conclusion of our discussion about class action.
 15 I have read your memorandum, and if you don't believe it,
 16 just take a look. I read it a second time on the way down
 17 here. So I am quite ready to rule on it now. And if you
 18 want a ruling on it now, I will be glad to do it. On the
 19 other hand, if you want to wait and listen to the discussion
 20 on class action and see what, if any, effect that has on
 21 your point of view, you may then suggest it to me. Is
 22 that satisfactory?

23 MR. JEFFERS: Well, perhaps -- as I
 24 understand Mr. Ferguson, the preference of the plaintiffs
 25 is to withdraw the motion?

1 MR. FERGUSON: No, no, not to -- to
 2 defer it. We are not going to withdraw it, we are only
 3 deferring it until the next pretrial conference on the
 4 assumption the Panel will have acted.

5 Now, if you have something about the notice,
 6 we will be glad to discuss that when we are discussing the
 7 notice. I think that is the proper time to discuss it.

8 Now, you, I take it, have received all the
 9 documents or asked to have all the documents pertaining
 10 to class action some little time ago, I would assume if
 11 you are interested in that subject you surely must have
 12 asked for the documentation and the briefs.

13 MR. JEFFERS: Yes, I have, Your Honor.

14 THE COURT: You have all that material,
 15 so you should know as much about it as anybody else knows
 16 about it.

17 MR. JEFFERS: Yes, my point is that I
 18 had no input in the class action application.

19 THE COURT: Oh, I understand that. I
 20 got that understanding here with a big underscore.

21 MR. JEFFERS: Yes, sir.
 22
 23
 24
 25

1 THE COURT: I know how grievously
2 you were put out about that. I am not overlooking it.
3 I will consider it and rule on that or any other conten-
4 tion you may make. Now, let's get on with the rest of
5 it. Do you want to go ahead and finish anything else
6 that you want to say, Mr. Jeffers? Please don't let me
7 defer you from it, but let's get on with the business.
8 Can't you wait and say whatever you want to say during
9 the class action matter, which is the last item on the
10 agenda.

11 MR. JEFFERS: I understand what
12 you are saying about the class action notice. What I
13 was wondering about was whether it was appropriate at
14 this time for me to address myself to the merits of
15 the motion to add Imperial which I had.

16 THE COURT: Why don't you do it
17 this afternoon when we get to discussing the class
18 action matters.

19 MR. JEFFERS: That is correct.

20 THE COURT: The next item, then.

21 MR. FERGUSON: The next item, Your
22 Honor, is clarification of the July 30 orders. I might
23 say that we have presented Your Honor a form of order
24 that we think is the answer to that problem. I sent it
25 to you with a letter which I have sent to all counsel.

1 And at the time of sending the letter, the plaintiffs
2 had not had an opportunity to meet. We have since had
3 an opportunity to meet. At the time several of the
4 plaintiffs were concerned about their position because
5 there were several plaintiffs who represented more than
6 one class as Your Honor defined the classes. And this
7 happened in this type of litigation. I don't think there
8 is anything wrong with it. No plaintiff would know what
9 classes Your Honor is going to eventually find. I think
10 Your Honor has come up with a very good segregation of
11 classes. I see nothing wrong with the classes.

12 I might say to Your Honor that the plaintiffs,
13 in order to save the Court's time and effort and judicial
14 wisdom, have appointed a study committee of allocation
15 of monies if and when they get the money. And in these
16 studies they have found that there are conflicts between
17 different market areas. There are possible conflicts,
18 probable conflicts between wholesalers, retailers, and
19 industrials. And to that extent, I think there is a
20 problem if anybody is trying to represent more than two
21 of those kinds of classes.

22 There is a separate group of classes, however,
23 that we have not been able to find or at least I don't
24 know of any conflict existing, and that is with respect
25 to the states. I don't know of any conflict between one

1 state and another or any potential conflict. My feel-
 2 ing is that if Your Honor hadn't come out with your
 3 ruling in the July 30 order that no lawyer or class
 4 representative could represent more than one class. We
 5 would have found trouble going down the line later on,
 6 and I think Your Honor has come up with the right decision.
 7 On the other hand, I see no reason to apply it to some-
 8 body if there is no conflict. So I would only say to
 9 you that I feel it is correct in all respects except
 10 with respect to the states. And if one class, one lawyer,
 11 for instance, wants to represent two classes, I don't
 12 see anything wrong with it.

13 Now, that -- the plaintiffs' steering committee
 14 has met. Some of the people didn't particularly like
 15 this situation, but I think they are all willing to adopt
 16 it. We have set up a procedure that may be, it is a
 17 little -- maybe we are a little too generous in the time.
 18 I think we set up 30 days in which to try to get their
 19 houses in order. Maybe 30 days is too much time. I
 20 think this is something we can discuss a little further,
 21 but my feeling is we have set up a procedure here whereby
 22 each of the plaintiffs who is class representative or
 23 attorneys for class representatives, can get their house
 24 in order in a reasonable fashion to accomplish Your
 25 Honor's purpose. And I think the purpose is well taken.

1 I don't think anybody really misunderstood. Some people
 2 just didn't like it. But I think we resolved that we
 3 will live with it. And I think we have to live with it.
 4 I think it is necessary. It is one of those things that
 5 in the course of events people find themselves straddling
 6 to horses, and it is a little dangerous. So I think we
 7 have submitted the order. The order is proper, and I
 8 think the order should be signed and submitted.

9 MR. RAVEN: Your Honor, I think it
 10 would be worthwhile to put this in context on the record
 11 a little bit. Your Honor recalls that one of our argu-
 12 ments during the class action argument was that under
 13 the Manual it was Your Honor's responsibility to look
 14 closely at each one of these people that purported to
 15 be a class representative to find out something about
 16 them, to look at their counsel, and then under the Manual
 17 to come down with as few as possible to get the job the
 18 done. Now, we lost on that, and I am not going to
 19 reargue it. But I just set that out for the background
 20 because I think it is important because the defendants
 21 do have an interest in it.

22 Then the next thing that happened was that when
 23 plaintiffs filed their memorandum in support of motion
 24 for clarification and/or modification to the order re
 25 class actions, we under (b) (2), A, B, C, D, E and F

1 suggested in addition some classes as class representa-
 2 tives -- or rather some plaintiffs and also some counsel.
 3 Your Honor came back in Your Honor's memorandum order
 4 of July 30, 1976, and said as to that as follows: (b)
 5 (2) A, B, C, D, E, and F approved only as to those
 6 class representatives who can meet both of the following
 7 requirements: one, those who represent only one class;
 8 and two, those who do not act as such for any other
 9 class.

10 Now, the plaintiffs obviously have some problems
 11 in knowing exactly the principle Your Honor had in mind
 12 because -- well, first, Mr. Ferguson sent in a letter
 13 in which he pointed out that there was some problem on
 14 this one procedure. We sent in a letter in which we
 15 said that we had approved as to form all of the plaintiffs'
 16 proposed order except Section V, which dealt with this
 17 problem. And we pointed out the reason we didn't approve
 18 it as to form because we were not sure of the principle
 19 Your Honor was acting on with respect to your order of
 20 July 30th. I think one thing that is very certain is
 21 that it is a matter for the Court and not a matter for
 22 plaintiffs' counsel to get together. They have no
 23 delegation from this Court or from the Manual or from
 24 the statute to work this out. And I would like to
 25 make a matter of record a copy of Mr. Kohn's letter

1 which I don't think Your Honor had seen until this
 2 morning when we mentioned it in chambers.

3 THE COURT: I just received it
 4 this morning.

5 MR. RAVEN: I would like to make
 6 that a part of the record, and Your Honor had a letter
 7 from Mr. Freeman that I hadn't seen. And I wonder if
 8 we could make that part of the record?

9 THE COURT: Yes, both of them
 10 may be admitted. You may Xerox a copy and distribute
 11 to all concerned.

12 (Exhibits Admitted)

13 MR. SALZMAN: Your Honor, I wish
 14 to say Mr. Freeman's letter was sent to all counsel.
 15 They should have it.

16 MR. RAVEN: Perhaps they have it
 17 in the morning mail.

18 THE COURT: These two originals
 19 here will be made of the record in this proceeding.

20 MR. RAVEN: I didn't want to
 21 suggest that Mr. Freeman hadn't sent copies to all of
 22 us.

23 THE COURT: They will be called
 24 court's exhibits.

25 MR. RAVEN: Your Honor, we have

1 limited interest in this, but we do have an interest.
 2 For example, if it is true that there are no conflicts
 3 between representatives of two government classes, that
 4 is fine. If Mr. Freeman wants to represent any number
 5 of states, that is none of our business as long as there
 6 is no conflict. But there are certain rules that Your
 7 Honor set down in his order in response to some of our
 8 arguments that we don't think we ought to have the
 9 disadvantage of them both ways.

10 Let me give Your Honor an example. Mr. Kohn
 11 asked in his letter, he says "Does the word 'class' in
 12 the order of July 30 refer to the word 'class' as used
 13 in the May 20th order or the word 'sub-class' as used
 14 therein or to both?" For example, U. S. class repre-
 15 sentative or counsel barred from representing an
 16 industrial user and a retail grocer in Class I. Well,
 17 I think Your Honor has ruled on that because if we
 18 look at Page 22 of Your Honor's ruling, class action
 19 ruling, Your Honor said this down near the bottom of
 20 the page, Your Honor said

21 "As for defendants', a second
 22 asserted conflict of interest
 23 between the direct purchasers
 24 in the industrial users class
 25 and the indirect purchasers in

1 the retail grocers class
 2 says, no actual conflict
 3 exists because the classes
 4 as defined and certified are
 5 separate and distinct."

6 I think Your Honor has ruled on that. I think
 7 Your Honor, in answer to our charge that there were
 8 conflicts there said no. I am not going to allow con-
 9 flicts to exist because I am going to make those classes
 10 separate and distinct. And I take it -- and this is
 11 what I would be interested in finding out. That is the
 12 type of thing Your Honor has in mind when Your Honor
 13 set forth these two requirements in your order of
 14 July 30th. But I think what this all points up, Your
 15 Honor, is this: that it is not for the plaintiffs to
 16 get together and just because they get their own house
 17 in order -- which is commendable but not really relevant
 18 to the order insofar as it affects the defendants --
 19 that we have to have some understanding of what principles
 20 Your Honor had in mind when you set up these two require-
 21 ments in your July 30th order. And that is why I suggested
 22 in my letter, with a copy to plaintiff liaison counsel,
 23 that we were hopeful that we would hear from Your Honor
 24 on this today and have some clarification and then we
 25 would know how to deal with the problem because I

1 submit that one of the problems is that there is not
 2 any evidence before the Court -- and Your Honor will
 3 remember that this was one of my arguments in the class
 4 action argument, that there was really no evidence before
 5 the Court from which Your Honor could determine those
 6 problems. Mr. Freeman says, well, I don't think, we
 7 don't know of any conflicts between the government and
 8 the classes. Well, I don't know of any at this time,
 9 either. But on the other hand, I don't know how the
 10 various states buy sugar. And if we should find that
 11 one state buys sugar direct and another one buys it
 12 indirect, there might well be a conflict between repre-
 13 senting those two clients. But none of us know that,
 14 and I submit, Your Honor doesn't. It is not in the
 15 record and we don't know.

16 Mr. Ferguson also said there were probably --
 17 I think he used the word "possible" and then he said
 18 probable conflicts between the classes.

19 THE COURT: Excuse me just a
 20 moment. I would assume that the counsel for these
 21 would be well inclined on that subject to report to
 22 the Court.

23 MR. RAVEN: Well, I agree with
 24 Your Honor on that, and I think that is one good feature
 25 in the plaintiffs' proposed order that they are proposing

1 the order. Your Honor signed the order that
 2 Mr. Ferguson sent you, the order modifying class
 3 action order dated May 20.

4 THE COURT: Yes.

5 MR. RAVEN: And in that Section V,
 6 one of the things --

7 THE COURT: What page?

8 MR. RAVEN: Pardon?

9 THE COURT: What page of the order?

10 MR. RAVEN: Your Honor, it is on
 11 Page 5, Your Honor.

12 THE COURT: Yes.

13 MR. RAVEN: It starts at Page 5,
 14 and one of the things they set up when you get over
 15 here on Page 6 is that within 30 days of the entry of
 16 this order counsel in those actions, seeking class
 17 representative status are hereby ordered to submit in
 18 writing to plaintiffs coordinating counsel -- I would
 19 like to suggest a change that I made. I really should
 20 have picked that up. It should be coordinating counsel
 21 for plaintiffs and defendants because we have interest
 22 in this, too, Your Honor.

23 And they set forth certain things. I think
 24 that is a good start. That is the thing we have been
 25 suggesting right along. We have got to know the facts

1 of this thing before we can rationally deal with it.
 2 So that is a good start, Your Honor, but I suggest,
 3 Your Honor, that plaintiffs' counsel have no delegation
 4 from you or from us or from the statute to go out by
 5 themselves and work that out on their own. So we ought
 6 to know what the principles are that are being followed
 7 on this matter. That is my offer. What are the facts,
 8 what are the principles, so we know how to react.

9 THE COURT: Are there any other
 10 portions of this proposal to which you wish to object?

11 MR. RAVEN: No. We approve all
 12 the rest of it as to form. Of course we maintain our
 13 objections, but as to form we have no quarrel with the
 14 other parts of Mr. Ferguson's and Mr. Cooper's proposed
 15 order.

16 THE COURT: All right. Thank you.

17 MR. SALZMAN: I am Jerrold Salzman,
 18 and it was our letter that was mentioned just a moment
 19 before. And if I may, I would like to speak for our
 20 firm, which represents Illinois and Indiana; that is,
 21 Classes 5 and 13, and also for Paul Sprenger, who repre-
 22 sents Classes 6 and 12, Minnesota and Wisconsin.

23 In the original appendix of the July 30 order,
 24 you designated those classes and denominated the attorneys
 25 for the classes; namely, our firm for Illinois and

1 Indiana and Mr. Sprenger's firm for Minnesota and
 2 Wisconsin. It was known to you at that time and listed
 3 in the appendix that the same attorneys would be repre-
 4 senting both of those classes.

5 Now, we are aware of nothing that happened
 6 between July 30th and the date of the proposed order that
 7 would have changed Your Honor's mind or opinion on that
 8 subject, nor do we know of any facts that have been
 9 raised or brought out by anybody since that date that
 10 should have changed Your Honor's opinion. We did say
 11 in our letter that we didn't know of any conflict. I
 12 think we said that we couldn't imagine any conflict
 13 between Illinois and Indiana or Minnesota and Wisconsin
 14 with respect to their representation of a class within
 15 each state of municipal entities; that is, public
 16 governmental bodies purchasing sugar. I can represent
 17 for Illinois and Indiana to this Court that they purchase
 18 in the same means and methods and they wind up buying
 19 from the same level of distributor in the system; that
 20 is, they both have public bids and they both purchase
 21 from distributors who make shipments to the various
 22 state agencies for which the state bids.

23 Now, we were somewhat surprised by this pro-
 24 posed paragraph that seemed, on its face, to apply to
 25 states as well as to other entities which would have

1 prohibited, say, the attorney general of the State of
 2 Illinois and the attorney general of the State of
 3 Indiana from hiring the same attorney to represent the
 4 states and their classes. And we think it is somewhat
 5 inconsistent with the position Your Honor otherwise took
 6 in your original opinion and order which was that each
 7 state, if it should come in by its own attorney general,
 8 the state may not be represented by another attorney
 9 general. As you know, the State of Illinois and several
 10 other states sought to represent classes of unrepresented
 11 states within the Chicago-West area, and Your Honor
 12 denied that representation and stated no, each state
 13 should come in by itself.

14 Now, perhaps that is correct. And Your Honor
 15 has ruled on it. But then when you come back and say
 16 not only must each state come in by itself, but each
 17 state must hire its own attorney and each state must
 18 be separately represented. Then you are compounding an
 19 economic burden and putting a very serious economic
 20 burden on the states. Although states are large bodies
 21 and they spend a lot of money altogether, everybody
 22 who has represented one, as many of the AG's in this
 23 Court can tell you, there isn't a lot of money allocated
 24 to prosecute federal anti-trust cases. And by forcing
 25 separate representation of states that are within the

1 same marketing area and as to which no conflict has
 2 been suggested by anybody on this record or anywhere
 3 even off the record, you are imposing a very substantial
 4 economic burden on the states and probably on the rest
 5 of the classes as well since the fees and costs and
 6 expenses, if any are to be awarded out of any settlement
 7 or any victory fund, would be multiplied substantially
 8 be reason of this ruling. And speaking again for our
 9 firm and for the Sprenger firm, we would suggest that
 10 that portion of Paragraph 5 be modified so as to clarify
 11 this issue and allow states to jointly hire attorneys
 12 to represent them and their classes. Thank you.

13 THE COURT: I definitely will do
 14 that after I have heard all there is to be said on the
 15 subject.

16 MR. KOHN: If Your Honor please,
 17 I think the position of most of the plaintiffs is
 18 relatively clear and simple. We do take the position
 19 we can agree with much, I think, of what Mr. Raven is
 20 saying. We can agree about one thing. We have never
 21 agreed and we cannot agree that defendants have anything
 22 to do with respect to conflicts among plaintiffs, the
 23 people who have the right to complain, the people who
 24 presumably would be adversely affected; namely, other
 25 claimants within the class.

1 Passing that, we would agree with Mr. Raven
2 that it is not for the plaintiffs to decide this matter
3 themselves. Your Honor is the only one who can make
4 that decision. All we intended to do was to say that
5 administratively, once you tell us what it is to be
6 done, we will do it. That is not to say, with all due
7 respect to Your Honor, that we agree with the propriety
8 of the ruling in all respects. I think, though, that it
9 will in no way interfere with the progress of this
10 litigation --

11 (Off the record discussion)

12 MR. KOHN: I think Your Honor
13 indicated already the most important thing is to proceed
14 with the notice to the class, whatever is necessary to
15 proceed administratively with whatever the plaintiff
16 can do we will do forthwith. My letter is one of the
17 few that I have written that takes no strong position.
18 It simply asks for direction. And we posed those issues
19 which we thought would have to be clarified in order to
20 enable us to do whatever it is that Your Honor wants
21 done in order to get the class notice out promptly. And
22 that we are prepared to do. If there are any other
23 problems, I think it would be one of those covered by
24 the letter. And the letter was -- as I say, it was
25 simply an inquiring letter. If Your Honor is proposed

1 to rule, I think the plaintiffs are prepared to, forth-
2 with -- as Mr. Ferguson indicated, and I don't think
3 it will take 30 days, probably closer to a week to do
4 whatever it is that Your Honor wants done and start the
5 notice, hopefully, on its way to the people who are to
6 be benefited, the class members.

7 I don't think there is anything more that we
8 want to say beyond the reservation that we don't necessarily
9 agree with the conference ruling, but we are prepared
10 and want to abide by it promptly.

11 MR. COOPER: Josef Cooper. I
12 wanted to amplify one of the things Mr. Kohn said which
13 relates to performing the administrative effecting the
14 ruling. Mr. Raven made reference to the selection
15 process, if that is the shorthand way of describing
16 the plaintiffs telling us where they have conflicts,
17 if they do have conflicts, which is contained in
18 Paragraph B.

19 Paragraph C does provide for consultation
20 among the plaintiffs and the defendants to try to
21 reach agreement.

22 THE COURT: You are speaking of
23 what paragraph?

24 MR. COOPER: Paragraph 5-B and
25 then C.

1 THE COURT: Yes.

2 MR. COOPER: It was intended that
3 the defendants would have input into attempting to do
4 this ministerial task. That is why Paragraph C was
5 drafted, so that the defendants' counsel would meet
6 with the plaintiffs' counsel as soon as all the plain-
7 tiffs' lawyers had written letters so we could have a
8 meeting and hopefully agree on one list for each of the
9 15 representatives. We were not trying to take it upon
10 ourselves, without having any input, but only setting
11 up a procedure where counsel on both sides could meet
12 and then send something to Your Honor hopefully by agree-
13 ment.

14 MR. RAVEN: May I ask Mr. Cooper
15 a question?

16 THE COURT: Yes.

17 MR. RAVEN: In view of that state-
18 ment, Mr. Cooper, and Mr. Ferguson, I take it you would
19 be agreeable if His Honor sees fit to sign this order
20 to make a change on Page 6, Lines 9 and 10 -- you would
21 be willing to strike the word "plaintiffs" Line 9, and
22 add after "coordinating counsel", "for plaintiffs and
23 defendants."

24 MR. COOPER: Your Honor, I think
25 very candidly we would be better off with the plaintiffs

1 to worry about getting all their people with their
2 letters written. We will, of course, show the letters
3 to Mr. Raven after we have them collected. But I think
4 it is going to be a simpler procedure for the plaintiffs
5 to worry about making sure that all of their people are
6 doing what they are supposed to be doing and having a
7 packet of information to give to the defendants rather
8 than starting two people worrying about the bookkeeping.

9 MR. RAVEN: May I be heard on that,
10 Your Honor?

11 THE COURT: Of course.

12 MR. RAVEN: Mr. Kohn stated that
13 it was none of our affair as to any conflict between
14 the plaintiffs. I don't believe that is the law. I
15 believe that if there is a conflict, we have as much
16 duty to root it out as the Court and the plaintiffs
17 because if we have a jury verdict come in for the
18 defendants in the first case, I don't want someone to
19 later to contend, some class member, that there was a
20 conflict and they were not sufficiently represented. I
21 repeat one of the things that has been bothering me is
22 that we haven't had before the Court the type of material
23 that the Court and all of the parties can move forward
24 on to determine whether or not there are conflicts. And
25 why shouldn't we get those letters just the same time

1 that they get them. Why not? I mean, if there is
2 some problem why shouldn't we be advised of it? If
3 someone thinks there is a conflict why shouldn't we
4 know of it? Why should we let the plaintiffs work that
5 out and smooth things over. They have a great facility
6 for working those problems out, but --

7 THE COURT: All I understood
8 Mr. Cooper to suggest was that they get all the material
9 at one time and submit it to you and give you an oppor-
10 tunity to examine it, ask questions, or do whatever you
11 thought appropriate. That is all I understood him to
12 say.

13 MR. RAVEN: I would like to have
14 a court order that says that when these comments come
15 in they go not only to plaintiffs but defendants.

16 THE COURT: They will come in with
17 a short fuse for commenting.

18 MR. RAVEN: Well, I think the
19 suggestion that I have made does it. If at Line 9 and
20 10 on Page 6 we strike the word "plaintiff" in Line 9
21 and merely karat in after "coordinating counsel" "of
22 plaintiffs and defendants," we have got it done.

23 MR. COOPER: The defendants have
24 copies of all the complaints, and all the counsel. They
25 can make their own list up if they think there is a

1 problem. This is an internal matter that relates to
2 the plaintiffs. And we have said that we will give them
3 all the information as soon as we have a packet collected.

4 MR. FIRTH: Your Honor, if I may
5 say one thing. Fred Firth, please, representing Mothers
6 Cookies. Excuse me, Harold. Good morning, Your Honor.

7 (Off the record discussion)

8 MR. FIRTH: I don't see why the
9 defendants have any right whatsoever to participate in
10 this matter. I think this is strictly a matter between
11 the Court and the plaintiffs' counsel. I don't see
12 where the defendants have any position here at all. Why
13 do we have to report to them, I respectfully submit.
14 This is the kind of matter that they like to throw in a
15 monkey wrench. They have done a pretty good job, I
16 respectfully submit, Your Honor. Even though Your Honor
17 has tried very hard to get it going. Now, what Mr. Raven
18 has got in mind -- I am familiar with these defense
19 counsel. What they have got in mind, as long as they can
20 keep this thing turning around and around, they won't
21 have those notices out for a year, a year from December.
22 I respectfully submit, Your Honor, we are just building
23 in here -- my brothers are a little more generous than I
24 would be. Mr. Ferguson and Mr. Cooper and Mr. Kohn, and
25 submit it to defense counsel and they have to approve it

1 or disapprove it or what have you. If Your Honor sees
 2 some conflict there, or if one of the plaintiffs' counsel,
 3 I can assure Your Honor on behalf of Mothers' Cookies, if
 4 I see anybody representing, any of the class, who I
 5 think have any conflict, I am going to run up to Your
 6 Honor and say "Your Honor, we have got a problem here."
 7 So I respectfully submit we are just building in another
 8 hearing 30 or 60 days the line, another item on the
 9 agenda where Mr. Raven can get up again and say I don't
 10 like this class representative and I don't like that.
 11 Thank you.

12 THE COURT: Whether they are
 13 entitled to it or not, I want the defendants to have
 14 an opportunity to express any criticism that they reason-
 15 ably should make for the guidance of the Court. I am not
 16 going to appoint you an amicus on that particular subject,
 17 but I think that is only a sensible thing to do. However,
 18 the time for doing it will be on a very short basis. If
 19 you can't discover something wrong with these people as
 20 class representatives in a week or ten days or something
 21 of the kind, we are going into action. If you later find
 22 something further that discredits them you can always
 23 make a motion. Anybody can make a motion at any time
 24 after we get going. But I don't want to defer all of the
 25 i dotting and t crossing and whatnot to delay getting

1 this class action in being.

2 MR. RAVEN: Your Honor, as soon as
 3 they give us the facts, within a matter of a couple of
 4 days, we can do that. I submit there is one thing that
 5 is being overlooked in all this. And that is the role
 6 of the Court in this matter. As I say, --

7 THE COURT: Well, I have to deal
 8 with the information that is provided me. I don't go
 9 out and investigate these matters myself personally. It
 10 is up to the counsel to present the information to the
 11 Court. That is the usual Court procedure. I suspect
 12 you wouldn't like me to run around and make some indepen-
 13 dent investigation.

14 MR. RAVEN: I wasn't suggesting
 15 that.

16 THE COURT: This is a very reason-
 17 able way to get all that you have to say on the subject
 18 and the plaintiffs as well in an expeditious way.

19 MR. RAVEN: All right, then as I
 20 understand it, the law questions that Mr. Kohn submitted
 21 to you in his letter, we will argue about those, and if
 22 we don't agree we will bring them to you.

23 MR. KOHN: I thought Your Honor
 24 would rule on them and direct us what to do.

25 THE COURT: I intended to go down

1 through your questions and inquire. But first of all,
2 are we agreed on who is going to do what about providing
3 the data?

4 MR. KOHN: Yes.

5 MR. RAVEN: They will get the data.
6 They will then tell us the way they see it, and we will
7 sit down with it and see if we have any problems.

8 THE COURT: Right. That has to
9 be an ideal way of doing it.

10 MR. RAVEN: We are agreeable to do
11 it within five days.

12 THE COURT: All right. Anyone
13 that doesn't understand that or wants to add any caveats
14 or have a special order about it, please speak. No one
15 responds. So ordered.

16 MR. FERGUSON: Your Honor, there
17 is one other matter there that relates to this, and that
18 is the Montana-Nevada situation. And the defendants have
19 been furnished a memo from Montana and Nevada. So I
20 think that matter should be clarified at this point if
21 you have anything to say on Montana and Nevada.

22 MR. RAVEN: It is true that just
23 before we told Your Honor we were prepared, we were given
24 a copy of the Montana -- I haven't had a chance to read
25 it. I don't know -- Mr. Kirkham, did you get a chance

1 to read it?

2 MR. KIRKHAM: I had a chance to
3 glance through it.

4 THE COURT: Why don't you wait until
5 after the break, and we will defer that item until after
6 the break.

7 MR. FERGUSON: Yes, Your Honor.

8 THE COURT: I take it that everyone
9 by now has a copy of Mr. Kohn's letter?

10 MR. KOHN: Yes, Your Honor.

11 THE COURT: And in this he asks
12 for a ruling or clarification of these several questions.
13 If you wish to present or make any statement concerning
14 each one of those, Mr. Kohn, you may do that. And then
15 counsel can respond. Or if counsel wish to make some
16 or the defendants wish to make any assertion concerning
17 each of these items, they may.

18 Item A. I do not desire any further comment
19 on that. However, I do wish to consider it further in
20 the light of all of the memoranda here. Then I will get
21 out a short memorandum, hopefully in the next couple of
22 days.

23 MR. RAVEN: On that one, Your
24 Honor, I might suggest you may wish to look at Page 22
25 of your class action order. The language I read from

1 the bottom of the page when Your Honor takes this matter
2 up --

3 THE COURT: Will you make a note
4 of that? Thank you. Very well, question B. A and B
5 both in that situation are familiar. I do think that
6 elaboration, Mr. Kohn, on the B section of your first
7 question concerning the relationship of the industrial
8 users and so on would be helpful. Would you amplify the
9 facts concerning that.

10 MR. KOHN: I think so far as that,
11 is concerned, the plaintiffs may be of two positions. I
12 think Mr. Ferguson expressed one view. I think there are
13 other defendants who feel differently. I would think
14 it may also be the case as to when the problem arises.
15 I think at the moment, insofar as we are concerned with
16 proceeding with discovery, with going ahead against the
17 plaintiffs -- against the defendants, there is no con-
18 flict among any plaintiff on any of these issues. Down
19 the line when it comes to damages or allocation of the
20 settlement, there may be a contrary view. The industrial
21 users in one area may possibly -- I don't think they
22 ought to, but they may possibly have a conflict as to
23 whether industrial users in Class I have sustained more
24 damages than industrial users in Class III, in which
25 event it might be appropriate to have different class

1 representatives. My own position, and I think I speak
2 for a number of the plaintiffs, is frankly that the
3 matter is not one of sufficient importance in view of
4 the large numbers of plaintiffs' counsel and plaintiffs
5 that you have here to detain Your Honor with extended
6 argument. We are prepared to abide by whatever it is
7 that Your Honor thinks ought to be done to eliminate any
8 possibility of controversy. There is an old story among
9 the Jewish people that if you have to ask if it is kosher
10 or clean or not, throw it out, even though you may ulti-
11 mately have thrown out a perfectly good pot. And it
12 doesn't really, to most of us at least, rise to a matter
13 where we want to burden Your Honor with having to decide
14 something else. Whatever you want, we are prepared to
15 follow. All I intended to do in the letter is illustrate
16 all that I could think of of the possible situations which
17 might arise where we need Your Honor's directions.
18 Regardless of the way you direct, we will follow forthwith.

19 THE COURT: Does anyone wish to
20 make any additional comment on this matter? All right,
21 it is submitted.

22 In answer to your question two, it is submitted.
23 But if there is anyone who wishes to speak to suggest
24 that there is a conflict, I wish you would do so.

25 MR. RAVEN: For the defendants,

1 that will have to await whatever information we get in
2 this report. We just don't know. We don't have the
3 facts.

4 THE COURT: Very well, then, that
5 matter is also submitted subject to the caveat you just,
6 yourself, supplied.

7 (Continued on next page)
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1 THE COURT: I would like you to address
2 yourselves to number three, those who consider that there is
3 a conflict or potential conflict and those who feel other-
4 wise. "Question Three: Is a class representative or counsel
5 barred from representing Class 15 and one or more of the
6 other classes?"

7 MR. BOONE: Your Honor, I am John Boone,
8 representing United A.G., a wholesaler Class 15. I am not
9 aware of any class representatives in Class 15 who has the
10 problem raised by paragraph number three. We didn't ask
11 that paragraph be put in there. I didn't know about the
12 letter. I am not sure it is necessary to go into it until
13 we get our affidavits from the counsel. I don't think it is
14 a problem, from what I have been able to tell. The three
15 counsel in Class 15 are only wholesalers, and we've no
16 interest in any industrial or retail or state class.

17 THE COURT: Thank you. Does anyone else
18 wish to comment on this subject?

19 MR. KOHN: Your Honor please, I think the
20 question we asked in item number three with respect to Class
21 15 should cover two classes, Class 14 and 15, both of which
22 were, as Mr. Boone points out, nationwide classes. I think
23 the problem would be the same. 15 was merely illustrative.

24 THE COURT: Yes, any other comment by anyone
25 on that subject?

1 MR. RAVEN: Maybe I can just have a running
2 statement as to all of those that until we get the facts, we
3 really wouldn't be able to speak to the point.

4 THE COURT: Well, on the basis of what you
5 presently know, do you know of anything that you can advise
6 the Court?

7 MR. RAVEN: My understanding -- and it is
8 not Mr. Boone's client but one of the others, his counsel
9 represents not only wholesalers but, I think, industrial. I
10 can't keep all these things in mind, but I do think there is
11 a problem.

12 THE COURT: You are under the impression that
13 there are more than that.

14 MR. RAVEN: I am under the impression that
15 Mr. Kohn's question is well taken.

16 (OFF THE RECORD.)

17 THE COURT: Is there any other comment on
18 three? Number four, "Is the class representative or counsel
19 barred from representing one of the classes if he is also
20 representing or seeking to represent an eastern class in
21 the MDL 201 litigation pending before Judge Cahn or in a
22 case pending but not yet reassigned to the multi-district
23 panel?" Does anyone wish to comment on that question? If
24 not, all of these matters are now submitted. And as soon as
25

1 we have this additional information, we will make a ruling
2 promptly.

3 MR. KOHN: Your Honor, with regard to what
4 you just said, there is no additional information that we
5 are to submit, is there? You will make your ruling and then
6 we will, in accordance with the ruling, prepare the informa-
7 tion, transmit it to Mr. Raven and to Your Honor, so that at
8 the moment all we are waiting for is your ruling. There is
9 nothing that either side proposes to given you at this time
10 with respect to the interpretation of your ruling.

11 MR. RAVEN: That wasn't my understanding,
12 Your Honor. My understanding was we would get the raw facts.
13 We would get the facts to apply to these questions, who are
14 counsel that represent both --

15 MR. KOHN: We cannot say whether somebody
16 now has to withdraw his appearance for one class because he
17 is representing another until Your Honor tells us whether
18 those classes are in conflict. That was the purpose of the
19 letter. As soon as you tell us, we will comply. I don't
20 know what Mr. Raven wants in addition.

21 THE COURT: In the meantime, though. Excuse
22 me, Mr. Raven. In the meantime, Mr. Raven has asked for the
23 data that you are going to provide.

24 MR. KOHN: There is no data we can provide.
25 We have made our submission with respect to the classes.

1 Your Honor has ruled. Your Honor then decided that either,
 2 that either claimant or a lawyer could not represent two
 3 classes. We simply asked Your Honor what you meant by two
 4 classes. And as soon as you tell us we will prepare to
 5 withdraw appearances or do whatever is appropriate. If Mr.
 6 Raven doesn't like what we then do, he makes whatever comment
 7 he wants. Your Honor, there is nothing further we can
 8 supply. I cannot say I will withdraw my appearance from
 9 Item A.

10 THE COURT: I understood you to say a little
 11 while ago that you would be providing the data within a
 12 couple days.

13 MR. KOHN: As soon as you tell us what it is
 14 that we must do. In other words, suppose you say, you ask
 15 me whether there is a conflict between industrial users in
 16 Class 1 and industrial users in Class 2. There are people
 17 who have their appearances entered for industrial users in
 18 both classes. At the moment we have no intention of doing
 19 anything. If Your Honor tells us that is a conflict, that
 20 people in both Class 1 and Class 2 for industrial users will
 21 withdraw appearances, or other people will enter appearances.
 22 That is all we can do. Now, we don't want to do it now
 23 until we know what Your Honor's thought is with respect to
 24 that. If Your Honor's thought is that that is a conflict,
 25 we will inform Mr. Raven and Your Honor what it is that is

1 proposed to do. It is nothing more than we can tell you.
 2 You know the counsel, the claimants. We don't want to
 3 relitigate and reargue the whole class motion procedure,
 4 which is what I take it Mr. Raven would very much appreciate
 5 doing.

6 MR. RAVEN: No, that is not correct. May I
 7 be heard on that? That is not correct at all. I don't
 8 want to reargue that. We have had our chance on that. The
 9 Judge gave us a full and ample time to brief it and argue.
 10 He has told us what he feels the law is, and we are prepared
 11 to go from there. We were talking about the fact that you
 12 would furnish to us, under the provision that you yourself
 13 proposed in this new proposed order, section five, a great
 14 deal of information, a list of which counsel are attorney
 15 of record, the class or sub-class, a statement of what action
 16 each party not qualifying under 5(A) intends to take. Neither
 17 the Court, I submit that neither the Court nor we can come
 18 to any conclusion, firm conclusion, until we know what the
 19 facts are.

20 MR. KOHN: Let's take what Mr. Raven has
 21 said. Paragraph B, appearing on page six of the order that
 22 Mr. Ferguson and Mr. Cooper have been referred to the Court
 23 to as having been submitted, it says we will furnish a
 24 listing of each action for which counsel are the attorneys
 25 of record. You now know --

(OFF THE RECORD.)

THE COURT: It now seems to me that we might suspend at this time, 12:30, and return at 2:00. Everyone, right where you are, can get on with the business of resolving just exactly what information it is you are expecting to get and what part of it you are willing to provide. Then we will work from there if there is no further problem in this particular area. Now, before we part, as far as I can see we are getting down toward the last question. Probably to go to 4:30 or 5:00 would be sufficient to cover those matters, but I have some doubts about it. I won't make any ruling now about whether we will carry on later or try to carry on later, but I suspect that it would be the better part of discussion for us to keep in mind that we may, and likely will, have a session tomorrow to resolve these matters.

(COURT WAS THEREUPON RECESSED FOR THE NOON HOUR.)

AFTERNOON SESSION

MR. FERGUSON: Your Honor, there was a little misunderstanding this morning between the parties. They have cleared it up. There is no further misunderstanding, and everybody is going to have exactly what they think they are supposed to have. Everybody is going to furnish everything they were supposed to do in accordance with that proposal that Your Honor had before.

THE COURT: During the noon hour, I spent all but about fifteen minutes of it going back over the questions that Mr. Kohn presented in his letter. And I have prepared and signed an order answering these questions.

I might say in passing that the answers to these questions are already in the record for the most part. In fact, I am not aware of any that aren't already in the record. But Mr. Gill will now distribute a number of copies before you, and you can fill in the date and the signature on it if you want. This one will be the file copy.

MR. FERGUSON: The next item is the second part of that July 30 order that relates to Montana and Nevada. The order that you have before you sets up a briefing schedule. The briefing schedule proposed there has been complied with, so all that is required on that is Your Honor's ruling, either now or later -- that would have to be a separate order presented to you to cover your ruling when and

1 if you make your ruling.

2 THE COURT: If there is anyone who wishes
3 to speak in opposition to the application of Montana and
4 Nevada, please present your views now.

5 MR. KIRKUM: Thank you, Your Honor. James
6 Kirkum, Pillsbury, Madison and Sutro for U & I. Apparently
7 I'm the only one of the very few who have had the opportunity
8 to read the piece of paper, and I don't have it in front of
9 me. But my recollection is that the supporting affidavit
10 and the facts presented in support of the certification of
11 these as class representatives of the political subdivisions
12 were two. One was an affidavit as to the experience and
13 qualification of one of the counsel involved, to which we
14 make no issue or address ourselves. And the second was to
15 the numerosity point that there were a certain number of
16 political units that it would be impractical to bring before
17 the Court. I don't know what the number is, but it was
18 several hundred. But the affidavits and record are silent
19 as to any factual basis for any of the satisfaction of any
20 of the subdivisions of Rule 23(B), with the possible
21 exception of the numerosity one as to whether the claims
22 would be typical or anything else.

23 Now, I am at somewhat of a disadvantage in
24 arguing here when I am under the injunction from this Court
25 not to reargue what we have argued in the past because I am

1 not sure that Montana and Nevada are different from any of
2 these several other states in that regard.

3 But even so, we want our opposition clear,
4 Your Honor, that there is no factual foundation, and in view
5 of at least U & I Incorporated -- unless anyone else has
6 other views on the defense side -- that this is a completely
7 inadequate record and improper upon which to base class
8 certification.

9 THE COURT: The certification is affirmed.
10 Exception is, of course, allowed. The next matter.

11 MR. RAVEN: I think, Your Honor, we are down
12 to the final matter now. I believe we agreed in Chambers
13 that that was both Item One of the defendants agenda and
14 Item One of the plaintiffs agenda, and that we also agreed
15 that logically Item One on the defendants agenda came first
16 because that had to do with the defendants position that at
17 this time it is too early to try to settle the notices. And
18 this is why we think that. We have got a number of reasons
19 available on that opinion. Your Honor will recall that we
20 have had a lot of discussion here and other hearings about
21 the settlement matters and about the fact that Mr. Freeman's
22 letter and about the fact that certain matters were submitted
23 to Your Honor. And Your Honor will recall that Your Honor
24 took the position that alright, you were not going to have
25 anything to do, and I think rightly so, with the settlement

1 matter until Your Honor had finalized the class orders. Now,
 2 starting from that viewpoint, we say that there is three
 3 major reasons why it is too early to try and finalize these.
 4 One has to do with the fact that it is quite clear that
 5 the argument that we have had here today so far, and with
 6 the fact that under the proposed plaintiffs order for modi-
 7 fication under section five, that there are things to be
 8 done yet before that order is going to be final.

9 The second item has to do with the Sucrest
 10 and Imperial matter. Now, I may have misunderstood Mr.
 11 Ferguson in Chambers this morning. The record will have to
 12 bear me out or perhaps he can correct me. But as I under-
 13 stand Mr. Ferguson, he said the reasons the plaintiff wanted
 14 to withdraw at this time the motions to join Sucrest and
 15 Imperial was, one, because of the fact that this matter
 16 before the Panel -- and I just want to be sure of two things
 17 on that -- I take it -- I know this was served. Has Your
 18 Honor had a chance to look at the motion made by some of the
 19 plaintiffs counsel in this case for Federal Bake Shop,
 20 Continental Coffee, and Green Leaf, where they have asked
 21 the Panel to reconsider the whole matter and put all the
 22 cases together? Has Your Honor had a chance to see that?

23 THE COURT: I don't think so. Do we have
 24 that document?

25 MR. GILL: We may have a copy of it, but we

1 don't have it with us here.

2 THE COURT: The suggestion there is that was
 3 filed with the Panel and not with me.

4 MR. RAVEN: But I think it shows service on
 5 Your Honor. I may be wrong on that. I was told that and
 6 I didn't check it.

7 THE COURT: It would never show service on
 8 me.

9 MR. RAVEN: Your Honor, I have to confess,
 10 I haven't checked it. I took someone's word for it. I can
 11 only represent what I was told.

12 THE COURT: If I got anything from the Panel,
 13 I assure you I would have read it. And I haven't read it.

14 MR. RAVEN: Your Honor, I didn't want to
 15 bore Your Honor with a summary of it if you had it, but since
 16 your haven't had it, I think it is extremely important to
 17 your consideration. And, in fact, unless there is objections
 18 from plaintiffs counsel, I think Your Honor ought to be
 19 furnished with a copy of it because I think it bears upon
 20 your whole class order.

21 THE COURT: There would be no harm.

22 MR. FIRTH: The only point I want to make on
 23 this is I hope we are not going to get into a big argument
 24 now about why because some plaintiffs counsel think the two
 25 cases ought to be together and some don't, Mr. Raven is going

1 to suggest that everybody close down for nine months and
2 wait for the Panel to decide whether these two cases are
3 going to go forward or not.

4 MR. RAVEN: I am not doing anything of the
5 kind. I think Your Honor should know about this. As we
6 pointed out in one of our papers, certain of the plaintiffs
7 in these western actions are now taking the position that all
8 of these cases should be put together. And I think some of
9 their statements really bear on this whole question. For
10 example, this is a document that, as I understand, it was
11 filed by Mr. Alioto, Mr. Goldberg, Mr. Cooper, Mr. Sheldon
12 Colon, Mr. James Sloan. And they have stated to the Panel,
13 among other things, that the discussion of the inner-rela-
14 tionship -- I am reading from paragraph fifteen -- between
15 the marketing territories of the various sugar suppliers in
16 the western - eastern market is merely illustrative. We
17 could go on elaborating on the overlap of marketing areas.
18 It would only lengthen this memorandum and accentuate the
19 situation. The point is that the sugar producers are not
20 neatly cataloged into two groups, with each group operating
21 separately and independantly of the other. Rather, the
22 geographical overlap of marketing territories, combined with
23 the national status of Amstar and Great Western demonstrate
24 the possibility of bifurcating this litigation. Then he
25 goes on to talk about market shares and so forth.

1 So we submitted in our paper there plaintiff
2 afforded evidence of the illusion of any western market
3 comprised of three geographical areas subject to the class
4 determination order in this proceeding, stands in dramatic
5 contrast to what plaintiffs urged Your Honor, some of these
6 plaintiffs in ruling on the class, and it smacks more of
7 what the defendants tried to tell Your Honor about these
8 marketing areas. But, in any event, this whole matter is
9 now to be taken up before the Panel. And another argument
10 that these plaintiffs counsel, some of them from the west,
11 make in this, they make the argument that there should be
12 one judge, and that that judge should have the opportunity
13 to look at all these overlapping markets and be sure that
14 there is no conflicts in any class selected, which I don't
15 think you can read it any other way than to say that Your
16 Honor or whoever the judge has picked to do that, if the
17 Panel grants that motion, should have a chance to look at
18 these classes that are urged out here, the classes that are
19 urged there, and might well come down according to these
20 plaintiffs, with a different class, different geographical
21 areas than Your Honor has done. So from that, we know that
22 the plaintiffs, a certain number of the plaintiffs take the
23 position that it is too early to settle these classes, when
24 you get right down to it, when you start comparing their
25 papers filed with other courts.

1 Now, the plaintiffs have admitted in the
2 paper they filed with Your Honor, which is called "Reply Of
3 Plaintiffs To Objections By Certain Defendants To The
4 Submission Of Proposed Form Of Class Notice And Proposed
5 Settlement," a document signed by liaison counsel and others
6 on behalf of plaintiffs steering committee. They say, and
7 I am reading from page 4,

8 "Assuming that the Panel does send
9 some eastern cases from this transferee court, it
10 will make no difference to most of the present
11 classes."

12 So there is a contention right by this plaintiff steering
13 committee that even they think that some of these classes
14 are going to be impacted by putting all of these cases
15 together -- which many of them seek, and if that is done,
16 then that will impact some of these very classes that Your
17 Honor has set up, and that they will be affected, they will
18 be changed. I think that is a fair reading of that. So
19 that is the contention from the plaintiff steering committee.

20 Now, I go back to this Sucrest-Imperial
21 matter for a moment because we have something on that too.
22 And, as I say, as I understood Mr. Ferguson this morning,
23 he gave two reasons as to why the plaintiffs did not want
24 to bring on at this time but not withdraw, but bring it on
25 at a later time after the notice has gone out, I think the

1 fair reported it this morning -- he said there is two
2 reasons, one because the Panel now has this multi-district
3 question before them, notice for hearing on October 3rd.
4 But let's examine that for a moment. It is true that
5 Sucrest is involved in some of the eastern cases, but this
6 again is what some of these plaintiffs counsel say in some
7 of their papers they have filed with the Panel. Sucrest
8 Corporation has heretofore been named as a defendant in the
9 eastern cases, even though it has a refinery in the city of
10 Chicago. Using Chicago as a basing point in defining the
11 Chicago - West market as its territory A, encompassing the
12 state of Illinois, Indiana, Ohio, Michigan, Wisconsin, they
13 are not saying Sucrest is coming out here as a piggyback on
14 some of the eastern cases. But they are saying that Sucrest
15 is a western case. But yet they don't want to touch that
16 for the moment. Why? They also indicated that Imperial is
17 an eastern case. Imperial, as Mr. Jeffers pointed out, is
18 not an eastern case. Imperial is in Texas. Imperial went
19 through the Grand Jury here in the west like the rest of us
20 did and like Amstar did, my client, who was not indicted.
21 But it is a western defendant.

22 Now, the second reason Mr. Ferguson gave in
23 Chambers, and I hope my notes are correct on this. I think
24 he said, and he can correct me if I am wrong, that the
25 second reason for withdrawing or holding off the decision on

1 the Sucrest and Imperial joinder at this time was because of
2 the settling defendants, the three settling defendants, who
3 did not want to hold up their settlement, didn't want it
4 impacted.

5 But I submit to Your Honor -- and I thought
6 it was very clear, Your Honor, this morning, very clear,
7 one, that the plaintiffs intend to ask you to join Imperial
8 and Sucrest at their own propitious time. I thought it was
9 also quite clear from Your Honor's comments that Your Honor
10 was inclined to do so. I think you, in a nice way, told
11 Mr. Jeffers that he wouldn't be joined today but he should
12 protect himself at all times.

13 Well, I think if that is all true, I don't
14 think we can send a notice out to these classes and hide
15 that from them. There has been a lot of talk from the
16 plaintiffs as to how you don't send out a notice and mislead
17 them. You have a full development. And that is their
18 argument for putting these settlement part, the 23(B) in
19 with the 23(C)(2). That is their big argument.

20 If that is true, are they asking Your Honor
21 and the defendants to sit idly by while the wool is pulled
22 over people's eyes out there by not asking Your Honor to join
23 those two defendants at this time because they think it will
24 hold it up? And yes, it will hold it up because I would
25 hope, if Sucrest and Imperial were joined, they would have

1 a right to argue the class action matter. They wouldn't
2 just be blanketed in without any finding of facts, and
3 without Your Honor's looking at their situation to see if
4 they properly should be in the class. I would hope they
5 would have their day in court on it. That is it, Your Honor,
6 we might as well call it what it is, and that is why the
7 plaintiffs are backing away. They are so anxious to get the
8 settlements in, and I don't blame them. They may never see
9 that much money again. They want to get that thing hooked
10 in, and they will do anything to do it. And so they are
11 telling Your Honor to hold off, don't move on Sucrest and
12 Imperial at this time. Let's get this notice out and then
13 we can grab them in here and throw them in court.

14 I submit to Your Honor it is wrong for them
15 to ask you to do that, and it is wrong to think we should
16 stand idly by and let them do it. So that is another
17 reason that it is not time for these notices. Now, I have
18 been accused, and it has already been anticipated by Mr.
19 Firth that I was going to get up here and stall. Your Honor,
20 we haven't stalled. Your Honor, I have tried to develop
21 some credibility with you. And let's take a look at the
22 picture. Let's take a look at the picture on discovery.
23 Who told you that we needed discovery in this case right at
24 the outset, and if we got right to it, we could have fair
25 discovery and have it done with? The defendants told you,

1 Your Honor. The plaintiffs said no. So finally, it took
 2 us longer and we had truncated discovery because of that,
 3 because Your Honor finally decided that we were right and
 4 they were wrong, and the record that we presented to you
 5 left them hanging there. So then we went through getting
 6 the economists and so forth, who, told Your Honor that on
 7 the representations by classes to who would be the class
 8 representatives in counsel, who told Your Honor that we
 9 should have the facts on that, we should have the facts
 10 before Your Honor before you ruled on it? Not the plaintiffs,
 11 the defendants. The defendants told Your Honor that. And
 12 it isn't the defendants who are coming in belatedly now and
 13 trying to devise these procedures to stick these things into
 14 the order that aren't there. It is the plaintiffs. They
 15 now have this famous paragraph five in their proposed modi-
 16 fication order. So we are now, instead of getting the facts
 17 in the usual course, as we should have had them before we
 18 had a ruling on the class action, we are now going to send
 19 questionnaires out to the plaintiffs counsel, and they are
 20 going to tell us what the facts are. And they are going
 21 to show up the extent they can, there aren't at that point.

22 Your Honor, what I am suggesting to you is
 23 that we should have some credibility. I am not saying that
 24 you should be so grateful that you should rule for us be-
 25 cause Your Honor is got to rule like you think is right. But

1 Your Honor should appreciate that we have established some
 2 credibility with this court. We have predicted what is going
 3 to happen on two things, and we predict on this, if we rush
 4 through this, in the long-run we are going to have more
 5 expense and we are going to have more delay than if we do it
 6 right. I submit to Your Honor that when we see what the
 7 Panel is going to do, if the Panel sends all of those cases
 8 out here to Your Honor, I think you are going to want to
 9 look at it, and you are going to want to look at your order
 10 in the light of these new facts some of the plaintiffs are
 11 now in, too, because some of the plaintiffs have come over
 12 to our side and are making some of the arguments we made
 13 before. So I submit to Your Honor that the time is not here
 14 yet to determine what is in those notices.

15 I will give you another reason. We have not
 16 seen the revised settlement agreements. They can be made
 17 available to us this afternoon, but we haven't seen them.
 18 Now, we should see those revised settlement agreements before
 19 we can tell what should be in the notice. And I think that
 20 is an issue. So I submit to Your Honor that -- I appreciate
 21 Your Honor's wish to get this thing, the notices out. I
 22 will point this out. Your Honor has been extremely prompt.
 23 I know of no other case of this magnitude, no other case --
 24 and if Your Honor could cite me one I would confess error,
 25 but I don't think Your Honor, with all your experience, will

1 be able to point to another case which has progressed this
 2 rapidly to this point. So I don't think there has been any
 3 dragging of heels here. Quite the opposite. But I think
 4 we ought to know what we are talking about before we take
 5 the thing up. And we shouldn't hide anything. If Sucrest
 6 and Imperial are going to be joined, those people out there
 7 should be told about it because there may be a supplier in
 8 Texas who would like to know about that. That supplier may
 9 say to himself, if he gets some notice that doesn't mention
 10 Imperial, he is thinking of suing him. He might as well get
 11 aboard this train too. He might not exclude himself. Maybe
 12 if he is told Imperial is in it, then maybe he will want to
 13 opt out and file his own case down in Texas. That is what
 14 the class should be notified about. Nothing should be kept
 15 from them as the plaintiffs have suggested here by this very
 16 adroitful maneuver that they are trying to pull off on
 17 Sucrest and Imperial.

18 Thank you, Your Honor.

19 THE COURT: You are welcome. Does anyone
 20 else for the defendants wish to be heard at this point?

21 MR. FERGUSON: If the Court please, in
 22 listening to this argument, I get the impression that the
 23 defendants believe that a class action order must be complete
 24 filed before anything can be done to put it into effect, and
 25 particularly before there can be any talk about a settlement.

1 As Your Honor knows, the class action rule provides that
 2 order may be changed at any time up to the final judgment.
 3 It can be changed at any time. And under the theory that
 4 the defendants have been presenting here, class action
 5 notices, settlement notices would never go out because there
 6 was always a possibility of changing something in the class
 7 action notice. I say to Your Honor, that is not the rule
 8 as it is not the law.

9 Mr. Raven suggests that we have withdrawn
 10 the Sucrest and Imperial motions. We have not withdrawn
 11 them. We have only proposed that they not be heard at this
 12 time on the ground that it is premature. I think we have
 13 good reason for it. I think the actions taken by the
 14 Judicial Panel in issuing these show cause orders to us to
 15 respond, it is certainly adequate reason. And because there
 16 is going to have to be, if some of these cases come out here
 17 that are similarly situated, there is going to have to be
 18 another notice in connection with them, that would be the
 19 proper time to give any notice that would apply to Sucrest
 20 and Imperial in my opinion.

21 Now, the defendant suggestion that there
 22 would be a great or drastic change in these notices. The
 23 fact is there is overlapping. I think as the court has
 24 heard in the Chicago-West area there are other companies
 25 selling sugar there other than the defendants that we have

1 named in this case. That has been apparent from the outset.
 2 It is in all of the economic data that has been furnished to
 3 Your Honor. And there are people like Sucrest and Imperial
 4 and others, many of whom are in the eastern cases, that
 5 should be treated alike. So I say to Your Honor that we
 6 have in mind a method of having that situation when that
 7 proper time comes. It has really nothing to do with this
 8 order, this notice, and these settlements in particular.

9 Now, there has been some mention made of
 10 the brief filed by some of the plaintiffs. Actually, the
 11 brief was filed by five plaintiffs out of how ever many
 12 there are here. It was not filed on behalf of the plaintiff
 13 steering committee, had no sanction from the steering
 14 committee. And the portions quoted said that there is an
 15 overlap between parts, not in territories. It has nothing
 16 to do with the territorial integrity of the Chicago-West
 17 market or any other market. It only indicates that there
 18 are some companies, in addition to the present defendants,
 19 who do sell in the Chicago-West market and other markets.
 20 We will call it the eastern market, not the western market.
 21 That is all that they are referring to. There is also a
 22 reference made in the brief indicating that one judge is
 23 going to change something Your Honor has done here. That
 24 isn't the situation at all. If these cases come out here,
 25 it will be Your Honor interpreting what should be done to

1 the eastern cases the same as Your Honor has treated the
 2 western cases. So all this brief did was say if you have
 3 one judge handling eastern cases and the western cases, there
 4 is less opportunity of conflict in orders. And Your Honor
 5 knows that. We all know that. And everybody here, I think,
 6 would like to see that happen.

7 Mr. Raven suggests that it is too early to
 8 settle classes. I think that is long past. These classes
 9 have been settled. There is no one here taking the position
 10 that it is too early to settle these classes. It has been
 11 our position, the plaintiffs position, that the classes
 12 should be settled at the earliest possible date and that the
 13 classes have been properly settled. And it is not the
 14 plaintiffs' position, it is not the plaintiffs' position
 15 that the bringing of any eastern cases here is going to
 16 change any of the present classes. The only thing it could
 17 possibly do, it might add some defendant in the Chicago-
 18 West territory and maybe the industrial class or some class
 19 of that sort. But it is only the Chicago-West territory
 20 that could be affected. And it would only possibly be the
 21 addition of some additional defendants. It would not change
 22 the territory.

23 Now, it has been suggested that Imperial is
 24 not an eastern case. I think the record shows that they are
 25 a defendant in the eastern cases that were filed when the

1 last case was filed. They are, as I understand it, defen-
 2 dants in something like four cases at the moment in those
 3 eastern cases. The point is made that notice to the class
 4 must inform the members of the class of Imperial or Sucrest.
 5 I don't think it is going to make a wit of difference to
 6 the members of this class. The Imperial has not been a
 7 defendant at any time in this litigation except in maybe
 8 three cases pending in this court. They will never be a
 9 defendant in most of the cases because venue is not obtain-
 10 able in most of the cases. The cases that we intended to
 11 join them in were only the cases that were pending in the
 12 Chicago-West market where venue was available. So all of
 13 this about Imperial and Sucrest is a red flag to, what? To
 14 prevent or delay the filing of the settlement agreements,
 15 the filing of notice to the class members, and the notice
 16 about the settlement agreements. That is the only purpose
 17 it serves here. As a matter of fact, Mr. Raven even admits
 18 that if Imperial was in here or Sucrest was in here, there
 19 would have to be hearings held again on this matter of
 20 classes. It would, he admits, it would hold up the sending
 21 out of this notice and the sending out of the settlement
 22 agreements and the hearings on the settlement agreements.

23 Now, that alone is a very good reason to hold
 24 up taking any action on those people at this time. I do not
 25 agree with him. As a matter of fact, I think they could be

1 handled in the same fashion that Montana and Nevada were
 2 handled. There has been a full hearing on the class action,
 3 but in order to avoid any problem on the question of a deal
 4 or the question of mandamus or the question of anything
 5 else, we suggest that we handle it in this fashion. It is
 6 not going to cost any more money, in my opinion, because I
 7 think we can handle it without it costing any more money.
 8 It is going to avoid delay in handling it in this fashion.
 9 We are saying this is a practical solution to a problem.

1 MR. FERGUSON: Defendants say they have
2 not stalled. Well, let me tell you what they have done.
3 It was eight months ago that we entered into the first
4 settlement. It was seven months ago when we entered into
5 settlements with C & H and Consolidated. And during that
6 period of time and shortly following we had some offers
7 from the defendants. As a matter of fact, we were well on
8 our way to terminating this entire litigation. And the
9 defendants made all of their various objections to bringing
10 these facts to light, have had the result of delaying
11 additional negotiations, have had an effect on delaying
12 ultimate settlement on these cases. And this kind of pro-
13 cedure is contrary to the policy of the law. Settlements
14 are favored in the law, and they should be favored because
15 they get rid of this lengthy litigation. We were well on
16 our way here to disposing in my opinion of this whole case.

17 As a matter of fact, I am of the opinion
18 that if we get this show on the road now and keep going,
19 that we will dispose of this entire litigation. It can be
20 done, and it can be done within a reasonable time in my
21 opinion. But I think we have to go down the road or we will
22 never get it accomplished. And every day's delay makes it
23 more difficult to get these things accomplished. So I say
24 to Your Honor, we are not asking Your Honor to rush, but we
25 are asking you to set up a reasonable schedule for notice

1 for hearing on the fairness and adequacy of these settle-
2 ments, to let us file the settlement agreements.

3 They say they haven't seen them. They
4 haven't seen them because they wouldn't look at them. We
5 have offered to let them look here this noon. They don't
6 want to see them. We have offered to let them see them.
7 We are not holding anything back from them. If they don't
8 want to look, they can't see. It is that simple. It is
9 like in the negligence cases which Your Honor remembers.
10 If you don't look, you can't see.

11 MR. RAVEN: You mean to tell us we have
12 never been offered to see them until noon today?

13 MR. FERGUSON: Did you ever ask me?
14 You never asked for them before. It is a very simple thing.
15 Don't complain here to me that you haven't seen them
16 because you are welcome to see them. We don't have any
17 secrets. All I can say, Your Honor, is that I think it is
18 time now that we go ahead and file the settlement agree-
19 ments, file the notices. We have held up presenting-- we
20 have worked on these notices for months. We have held up
21 presenting the notices to Your Honor because they referred
22 to the settlements. So we would not contaminate Your Honor.
23 Now, it has gone beyond the point of the ridiculous. And
24 I say to Your Honor it is time to get on with the show.

25 MR. FIRTH: I would just like to correct

1 a misstatement. Mr. Raven said that the steering committee,
 2 the plaintiffs' committee of which I am one member, filed
 3 that piece of paper. I think he misspoke at that point.
 4 And I don't see why if one or two or three of the plaintiffs
 5 counsel gets some hairbrained idea about their desire to
 6 give Your Honor more work, I don't see why that should stop
 7 us, that should stop us. And to the extent that it says
 8 here that on behalf of the plaintiffs' steering committee,
 9 it wasn't on behalf of the plaintiffs' steering committee,
 10 I was never polled on this. I asked Mr. Kendrick. He told
 11 me he never was polled on it. And it wasn't filed on behalf
 12 of the steering committee. And I think it sets a very bad
 13 precedent if two or three plaintiffs in these multi-district
 14 cases who get some idea that they are going to combine
 15 something and they file something in front of the panel,
 16 and then all the rest of us sit and wait, that class notice
 17 is going to do something else. Some of us haven't decided
 18 one way or the other on the settlement. That class notice
 19 is going to establish the classes. Maybe we will know who
 20 is in and who is out. We will know whether to push, Your
 21 Honor, for a trial on some individual cases or a class
 22 trial. Mr. Raven is telling us he wants to go to trial.
 23 So the best way to get us to trial--

24 MR. RAVEN: The last time--

25 MR. FIRTH: Excuse me, Mr. Raven. The

1 best way to go forward and get on to trial would be to
 2 have that class notice go out so that we know whether we
 3 have viable classes or not. Maybe so many people will opt
 4 out we won't have any classes. We have proposed to Your
 5 Honor a different form. So I just ask that we not let one
 6 or two of the plaintiffs who get some idea mess up the
 7 whole notice procedure that we have worked so hard to
 8 establish, Your Honor.

9 MR. FERGUSON: Mr. Firth and Mr. Raven
 10 are talking about two different briefs. Mr. Raven was
 11 talking about the brief that was filed before the panel,
 12 and Mr. Firth, I think, misunderstood and was talking about
 13 a different brief that I signed in connection with this
 14 matter of whether or not this ought to be heard.

15 MR. RAVEN: That may be, Mr. Ferguson.
 16 I think you are probably right. But I was very precise
 17 when I stood up here and I read, and I showed Mr. Ferguson,
 18 as he recalls, the document that I was referring to, which
 19 I said was filed on behalf of the plaintiffs' steering
 20 committee, which it says. And I made very clear when I
 21 was talking about the other document, which perhaps maybe
 22 I could hand up a copy to the Court now--

23 MR. FERGUSON: I have no objection.

24 MR. FIRTH: May I see that? This is
 25 what I am talking about, Your Honor, the request for the

1 panel.

2 MR. RAVEN: I wish you would listen
3 more carefully.

4 MR. FIRTH: I listened very carefully.

5 MR. RAVEN: Your Honor, may I just--
6 remember what I have been saying about credibility. Should
7 I leave this with Your Honor, because I think Your Honor--
8 well, Your Honor, I do submit that I think Your Honor ought
9 to look at this motion that has been filed before the
10 panel. So if I may leave it with the Clerk. Although it
11 is my understanding again, someone said again that it shows
12 service.

13 THE COURT: I don't care whether it
14 shows service or not. It has not been served on me. I
15 know from what you said this morning that it came in.

16 MR. RAVEN: If anyone should say anything
17 about the U. S. Mail it should be me and not you.

18 THE COURT: I will read it if you think
19 I should.

20 MR. RAVEN: Let me make these points
21 in rebuttal to Mr. Ferguson. What is the hurry, Your Honor?
22 Even the plaintiffs say that nothing is being held up here.
23 They say that-- they make it clear that they are not going
24 to ask you to send these notices out at this time. At least
25 that is how I read their papers. Mr. Ferguson stood up here--

14 - 6

1 THE COURT: I think you are mistaken.

2 MR. FERGUSON: You are definitely
3 mistaken. I don't think we are dealing in futility. We
4 mean business, very seriously.

5 MR. RAVEN: Well, I misread one of your
6 earlier papers. I thought it was clear that you didn't
7 intend--

8 MR. FERGUSON: I said you were objecting
9 to even the form of the proposal. You weren't talking
10 about objecting to our sending them out.

11 MR. RAVEN: We are objecting to the
12 time of the proposal. But in any event, let's take another
13 point here. Mr. Ferguson just stood here and said, okay,
14 we will take care of our Sucrest and Imperial. When you
15 join those we will send out a second notice. And that is
16 exactly the thing I am objecting to, Your Honor. Why should
17 we do that? Why should we put that off for some reason that
18 still isn't clear to me, and I still don't think it is
19 clear to Your Honor as to why the plaintiffs want to put
20 that off. If they want to put it off then they are going
21 to ask Your Honor to send out a second notice with all that
22 other expense after they are joined. Now, what is the
23 purpose of that?

24 Now, Your Honor, I don't know if Your
25 Honor has received a copy of the panel's latest statement

1 on this, but I think it would be helpful if I could just
2 read one paragraph that gives a little of their opinion.

3 "Because of the suggestion of various parties in
4 this litigation, you and each of you are hereby
5 ordered to show cause on all actions listed on the
6 attached schedule A, B and C. . .", all of them
7 United States, ". . . should not be transferred to
8 a single district for coordination or consolida-
9 tion for trial pursuant to 28 USC 1407 and why
10 all previous opinions and orders by the panel in
11 this litigation should not be vacated and this
12 entire matter be considered by the panel de novo."

13 They are going to take another look at this whole thing.
14 And I think Mr. Ferguson misunderstood me when I was talking
15 about the conflicts in ruling. I suggested that if they
16 send these cases out to Your Honor, that Your Honor, not
17 some other judge, but Your Honor would want some other
18 judge to take a look at this thing anew because-- and
19 again I cite, and this time make it clear again, this time
20 I refer to Paragraph 27 that comes out of the paper filed
21 by Mr. Cooper and Mr. Alioto and Mr. Goldberg before the
22 panel. They say the defendants. I take it they are
23 referring to the eastern defendants. They can't be talking
24 about us. You see, the defendants have pointed to the
25 possibility of conflicting class rulings or definitions to
justify the need for bifurcation. We believe that this
possibility precludes rather than supports the continued
having of these proceedings. The only way to insure against
inconsistent class rule is to have the same judge consider

1 Rule 23 motions. So I think they are using them back there
2 too. Let us take a look at this anew. We think there are
3 national classes.

4 Mr. Ferguson says that Imperial is
5 joined in the eastern cases. He is right in one sense.
6 There were four cases filed back there. They are not
7 eastern cases. They purport to set up a nationwide market,
8 a nationwide class. These new cases that have been filed,
9 and that is why the panel said I guess we will have to look
10 at this thing again. We were led to believe that these
11 were small geographical areas, and now we are being told
12 that this is nationwide.

13 MR. RAVEN: Your Honor, there is a lot
14 of talk about processing cases anymore and disposing of
15 cases. But I submit to Your Honor, that these--

16 THE COURT: Terminating, also.

17 MR. RAVEN: Terminating, too. And I
18 take it that one way you terminate them is to try them.

19 THE COURT: An excellent way.

20 MR. RAVEN: Yes. I don't think that
21 we should have these constant arguments from the plaintiffs
22 that they are going to deliver us all to us if you will
23 just sign enough orders. I don't think that is going to
24 happen. I remember once telling Your Honor that we felt
25 strongly about these cases. We are the biggest company in

1 the industry. We went through eighteen months of Grand Jury,
2 and we are not indicted. And I give the Government a lot
3 of credit for looking at it very thoughtfully and looking
4 at what the evidence was and leaving us out.

5 Your Honor suggested, I think, that
6 with twenty cents I could get a Chronicle. I think it
7 comes to a little more than that. I think Your Honor was
8 pulling my leg a little bit on that one, and I appreciate
9 that. So this question about costs and processing cases,
10 I don't think we ought to lose sight. If we are going to
11 try cases, we have to come to the facts on them. So I
12 suggest to Your Honor that when you think in terms of some
13 of these cases being tried, it is all the more important
14 that we go carefully and have all the facts in before you
15 are asked to act because I think again this is the place
16 where haste can make waste.

17 THE COURT: Yes.

18 MR. JEFFERS: May it please the Court,
19 I listened to Mr. Ferguson just now and tried to reflect
20 on our colloquy earlier this morning to see if I can come to
21 grips in my own mind a little better with our position
22 because I must confess I feel rather in an unusual position,
23 being half in and half out, being asked by the Court to
24 lodge such objections as I might have to the notice while I
25 am here today, even though I remain in all of the non-govern-

1 mental cases as a non-party.

2 My position with respect to the notice,
3 or that position--

4 THE COURT: I had better interpolate
5 that I think it is to your advantage to hear what is being
6 said. Whether you want to express any views about it at
7 this time is another thing.

8 MR. JEFFERS: I appreciate that, Your
9 Honor. The position of Imperial Sugar Company as to the
10 notice is as follows. I recognize that in the cases in
11 which we are already a party, that is those filed by the
12 States of Indiana and Illinois and the cases in which we
13 have not objected to becoming a party; that is, those filed
14 by the States of Kansas, Colorado and Minnesota.

15 THE COURT: Incidentally, I think I had
16 better rule now that that is approved by the Court.

17 MR. JEFFERS: The States of Minnesota,
18 Kansas and Colorado.

19 THE COURT: No objection? They're
20 admitted.

21 MR. JEFFERS: That was in our brief.

22 THE COURT: All right.

23 MR. JEFFERS: I recognize that as to
24 this notice and as to those cases, we are bound by whatever
25 is decided on that notice. As to the cases by non-govern-

1 mental plaintiffs, in which we are not parties but in which
2 it is proposed that we be parties, we have no specific
3 objection today to make to the form of the notice, but in
4 the event we are made parties to these cases, we will object
5 to this notice that is under discussion today on the grounds
6 that we did not have a fair opportunity to be heard as to
7 its contents.

8 We object to the notice, and for the
9 same reason we object to being joined in these twenty-one
10 non-governmental cases by amended complaint on the ground
11 that we have not had an opportunity to be heard on the
12 matter. We have not been given an opportunity to be heard
13 on the class action issues. I think Mr. Ferguson has stated
14 it very candidly this afternoon, just what it is I am
15 complaining about. He says that the reason for plaintiffs
16 wanting to defer the matter of Imperial being a defendant
17 is that it would interfere with the final resolution and
18 with the class action determination, the final resolution
19 of the class action issues and the notice. If you bring us
20 in now, it is going to confuse the whole picture as to
21 whether the class action resolution stands and where the
22 notice matter stands. That is what he says. I don't have
23 any criticism of the plaintiffs' counsel for proceeding
24 along that way. They are not retained to represent the
25 interests of the Imperial Sugar Company. They are just

1 trying to prosecute their own cases in the most expeditious
2 practical way possible. That is what he said this afternoon
3 he wants to do. It is more practical for us if we can get
4 this class action issue all tied up with a bow, then we
5 will talk about these other parties. I am here for Imperial
6 Sugar Company because I am the one they do pay to represent
7 their interests, and I am saying the way we object to being
8 foreclosed from hearing on those issues.

9 Now, Mr. Ferguson says, talks about how
10 they had all these problems with venue for Imperial Sugar
11 Company, and he says that is why there are actually not
12 many cases that Imperial will have been in, twenty-one non-
13 governmental cases that we are proposing that we be in.
14 That is quite a number of cases. I think he was alluding
15 to is what they said in their response brief, it took them
16 all these months to decide whether or not to join Imperial
17 because they didn't know about what venue they could join
18 Imperial Sugar Company in.

19 Well, I don't know what was going on in
20 their minds about Imperial Sugar Company. I know that in
21 August, 1975, according to their own pleadings, they knew
22 enough to name Imperial Sugar Company as a co-conspirator
23 in eighteen cases as of August, 1975.

24 Now, those same eighteen cases, or the
25 ones that they just now filed, the composition of the cases

1 that they propose to join Imperial in didn't change from
 2 August, 1975, to June, 1976, when they filed a motion. So
 3 consideration of venue didn't have anything to do with all
 4 this delay in joining Imperial Sugar Company. I know that
 5 by January I filed an answer in the American Bakeries case
 6 conceding venue in the Northern District of California. By
 7 March, I had filed an answer in the Interstate Brands case
 8 conceding venue in the Northern District of Illinois. That
 9 is where all these cases that were now proposed to be joined
 10 in are filed. So it wasn't venue that was holding all this
 11 up. It had nothing to do with it. What it is is they
 12 wanted to prosecute their cases this way officially and get
 13 the class action resolved.

14 And I also point out on this question
 15 about venue, that if you look at the Sucrest motion, motion
 16 to add Sucrest to a certain number of cases, most of them
 17 are the same cases they are trying to add Imperial in. I
 18 don't know how these cases are selected, but Sucrest and
 19 Imperial are far apart in terms of where they do business,
 20 and yet most of the same cases they propose they be joined in.
 21 So it wasn't venue consideration. So I think that what the
 22 reason is that they want to defer adding Imperial is just
 23 what Mr. Ferguson has said. It makes it much simpler to tie
 24 up the class action matter if they do it that way. And I
 25 am just here for Imperial objecting to not having been heard

1 on all these class matters that they are trying to tie up.

2 Again, I do not understand what any
 3 action the multi-district panel may take has to do with this
 4 because we are not an eastern company, we are not joined in
 5 any of these-- we weren't joined in any eastern cases. We
 6 were joined in some cases in the District of Illinois just
 7 recently that named all these suppliers in a nationwide
 8 conspiracy. We have not been in the eastern cases as such.
 9 And there is no reason for us to be in those cases, we are
 10 not an eastern refiner. I don't understand why the multi-
 11 district panel dependency of matters before the multi-dis-
 12 trict panel has anything to do with Imperial's posture. I
 13 do not understand what considerations of venue have to do
 14 with it. And I really do not understand why it is that this
 15 motion, why it is that they wanted to defer this motion
 16 except that they-- it is a neater procedure to get the class
 17 actions wound up. And as I say, I don't blame them for
 18 proceeding that way. I hope they don't think I do. I am
 19 just objecting from Imperial's standpoint.

20 THE COURT: You are welcome.

21 MR. FERGUSON: Your Honor, I have just
 22 one very short comment. Mr. Dwyer has been listening to
 23 this and made a very practical suggestion. And the suggestion
 24 is all of this problem can be solved by putting into the
 25 notice to the class a mention that the plaintiffs have moved

1 to add Sucrest and Imperial as defendants. The motion
2 hasn't been ruled on yet, and we will accomplish all that
3 they are complaining about that we have not been fully
4 informing our class members. If they want to, we are
5 perfectly willing to add those few words.

6 THE COURT: Does anyone wish to comment?

7 MR. RAVEN: It doesn't seem to me, Your
8 Honor, that that is any suggestion. It is a little cuter,
9 perhaps. It still doesn't tell them the truth. I think
10 that is what we ought to be interested in. If you are
11 going to tell them the truth and say that we are going to
12 hook them as soon as we get that notice out. We are going
13 to hook them and have them in here. Now just tell them that.
14 That is the truth.

15 THE COURT: Is there anyone who has not
16 had an opportunity to express himself on any of these
17 matters?

18 We have three matters left here on the
19 calendar today. As I see it, the first one is this order
20 modifying class action composed of fourteen various items.
21 Is that order now fully covered, so that we can modify, if
22 necessary, and get it entered today?

23 MR. FERGUSON: I believe it is ready to
24 be entered, and it has been approved as to form with the
25 exception of that paragraph 5 that we have discussed fully,

1 paragraph 5 in all of its detail.

2 MR. RAVEN: I think that is right, Your
3 Honor.

4 THE COURT: That happens to be the one
5 that I have marked. Have you a clear copy? Bring it over,
6 please.

7 (Off the record)

8 MR. FERGUSON: Your Honor, I have a
9 clean copy that I have signed, and I think I just found
10 the original. And I think this is the original. You did
11 agree to that modification on the page.

12 THE COURT: Did you agree as to form?

13 (Off the record)

14 MR. RAVEN: Back on the record. Your
15 Honor, it is my understanding that we have an agreement with
16 plaintiffs on Page 6 of this order that at Line 9 we will
17 strike the word "plaintiffs" and then on Line 10 after
18 "coordinating counsel" we will add in "for plaintiffs and
19 defendants."

20 THE COURT: Will one or the other of you
21 interline as you go and please endorse the form.

22 (Off the record)

23 THE COURT: All right, gentlemen, I have
24 corrected the date to the 16th. It was originally typed
25 in the 12th. I have done that in pen, so if you want to

1 make that correction, the order is signed and it shall be
2 entered forthwith.

3 MR. COOPER: We will take this with the
4 other and have them filed. We will have to make a copy.

5 THE COURT: We will have a break here
6 and then we will tend to the filing. Did you file the
7 orders that were entered this morning?

8 MR. COOPER: We have to make a copy of
9 them first. The Clerk won't give us this once they stamp
10 it.

11 THE COURT: Now, the next thing has to
12 do with the proposed settlement. I can see no possible
13 harm that can come to anyone from having the settlement
14 papers, whatever they may contain, be lodged subject to
15 some sort of a limitation order and open to the inspection
16 of counsel for any defendant that is interested in reading
17 it. It is a little hard for me to understand how anyone
18 could debate an order of that kind until he had read it.
19 That is a new procedure that I don't know anything about.
20 If there be any such occasion. I think that this should
21 be done at this recess. Whatever kind of protective order
22 that you think appropriate, I suggest that the liaison
23 counsel for the defendants should perhaps examine it with
24 the view of suggesting any limitations. I would hope, of
25 course, that there be no publicity that might adversely

1 affect the impanelment of the jury in this district, so
2 that some sort of restriction, at least to that extent,
3 should be prepared and the text agreed on. I will sign it
4 in that way. We are going to take a recess now, and after
5 you have read that material, or if you would prefer to
6 wait until tomorrow morning and digest it after dinner or
7 some other time, I would be happy to take it on then.

8 MR. KIRKEN: May I just make one point,
9 at least one. I think all of the settlements have already
10 been publicized. That problem may be very easy to solve.

11 MR. FERGUSON: Your Honor, because of
12 the SEC regulations and because of the sum of the money
13 involved, it was necessary for some of these defendants to
14 notify the press at the time they entered into these agree-
15 ments. Now, that goes way back to last December.

16 THE COURT: I never saw them or heard
17 about it in that way.

18 MR. FERGUSON: They were in places like
19 the Wall Street Journal and financial papers of that sort.

20 (Off the record)

21 MR. RAVEN: There is no SEC rule that
22 they must ring the bell again.

23 THE COURT: Do whatever you think is
24 appropriate. I leave that up to you after you have examined
25 this material and then tell me what your pros and cons

1 about the matter should be.

2 MR. RAVEN: On the notice?

3 THE COURT: No, I am talking about the
4 settlement. I am not going to get into the notice.

5 MR. FERGUSON: Could we have a fifteen
6 minute recess? I think this is adequate.

7 THE COURT: That is up to you.

8 MR. RAVEN: For what purpose are we
9 looking at it?

10 MR. FERGUSON: Just to tell the Court
11 if you have any objection.

12 MR. RAVEN: I hope we are going to have
13 more than five minutes for that.

14 THE COURT: You can have until tomorrow
15 afternoon about 4:00. I want to go home by that time.

16 MR. RAVEN: I think we are passing like
17 ships in the night here. The only reason I wanted to see
18 the settlement agreements is if Your Honor ruled against
19 us on our point that we shouldn't go forward. Your Honor
20 indicated this morning that you were inclined to do that.
21 If Your Honor rules against us on that, I would like to see
22 the settlement agreement-- because among other things, what
23 I would then suggest, Your Honor, we would want to sit down
24 and we would be prepared to do it right away. First the
25 defendants would like to take a little time. Then we would

1 like to meet with the plaintiffs' counsel on the notices.

2 THE COURT: All right.

3 MR. KOHN: In the light of what Mr.
4 Raven is suggesting we would have no objection, certainly,
5 to giving them-- so they can consider the whole matter in
6 context, the settlement agreements, the proposed form of
7 notice, which refers to those settlement agreements, and
8 the proposed form of order. So that when they come back
9 they can say here is what we object to. We agreed A, B, C,
10 D, and we object to E, and you rule on E.

11 THE COURT: That adds another point.
12 I was going to talk about the notice. I think that what
13 we should do to deal with this matter carefully, thought-
14 fully and not hastily near the end of the day, is recess
15 now until tomorrow morning at 9:30, at which time we will
16 go forward with these matters in whatever way you may desire.

17 MR. FERGUSON: Excuse me. We would like
18 to deliver to Your Honor so that you would have them during
19 this period of time the settlement agreements and the
20 proposed notices so Your Honor would have the same period
21 of time to be studying them.

22 MR. RAVEN: Of course, that is our whole
23 point. If Your Honor rules against us, as you indicated
24 you would this morning, may I say this. I want to be sure
25 that I have made one point very clear. Something Your

Honor said made me--

THE COURT: I am not going to act on the propriety of these without looking at the papers.

MR. FERGUSON: You have to look at the papers.

THE COURT: And I will discuss them with counsel and listen to whatever they have to say about it. Of course I am not going to do that. But I don't want to do it until after you gentlemen have had an opportunity to discuss these matters between yourselves.

MR. RAVEN: I have looked at their proposed notices.

THE COURT: And the substance of the proposed settlement?

MR. RAVEN: I have looked at the old ones. I understand that they are much different. I hear that by rumor.

THE COURT: I don't want to read any of them until they are in final form in which they are going to be proposed.

MR. RAVEN: Yes, Your Honor, I just want to make this one point so the record is absolutely clear. Your Honor indicated when I brought this thing up this morning that you would be inclined to rule against me but that you would hear my argument. But we are very serious

about the argument we have raised and we do not intend to waive that in any respect. In other words, it is our position that this matter should not be covered at this time for a number of reasons, which I have stated and won't be argued. But there is one-- something Your Honor said made me feel that I really didn't get that across to you. Your Honor at one time said, "I don't want to hear anymore about these notices until everyone agrees it is the time to do it and the class thing is behind us." One of the things, Your Honor, is if Mr. Cooper, Mr. Alioto, Mr. Goldberg, and the others succeed in their motion to put all these cases together, they are then sent out here to Your Honor. Then I think-- Your Honor, I think part of the charge will be that you will want to look at this thing again. And then we will be in the position that we have always resented that we were placed in and you were placed in before by the plaintiffs filing with the Court, contrary to the rules of this Court, settlement documents. And the Freeman letter was laid out in some detail. It was not your doing, and it wasn't my doing.

THE COURT: I hadn't read a word of it.

MR. RAVEN: Well, you read the famous letter, Your Honor. They submitted one of the settlement agreements to you. They called you on the telephone. They told you the amount of the settlement. I don't want to

1 repeat this, but it is a matter of some resentment on our
 2 part. And I think properly so because I think it is
 3 improper. I heard a lawyer chewed out, you wouldn't believe
 4 it, by the panel for even suggesting that the settlement
 5 should be worked out before the trial judge considered the
 6 classes. The panel was shocked that lawyers were doing
 7 that. I think they would be more shocked to know before
 8 the class determination that material was turned over to
 9 the judge. My point is, Your Honor, I think you are going
 10 to have a chance to look at this again. And I think you
 11 are going to have some of these plaintiffs arguing more
 12 along the lines of what the defendants argue here. And I
 13 think Your Honor is going to look at these classes again.
 14 And I know--

15 THE COURT: I won't look again. I will
 16 look a time, the first time. I have never looked at any
 17 of them.

18 MR. RAVEN: Oh no, I mean the whole
 19 question of the classes, of your order, in the light of
 20 the new cases that might be sent to you, Your Honor. And
 21 at that time we would like to have you approach it without
 22 being all balled up in these settlement discussions.

23 THE COURT: I am going to cut this
 24 short now. And we are going to recess and you gentlemen
 25 are free to do whatever you have a mind to do. I hope that

1 you would have some discussions.

2 MR. RAVEN: We will do that, Your Honor,
 3 as long as Your Honor understands.

4 THE COURT: It is late in the day
 5 because you are going to have to have some time to do some
 6 discussing. And you can spend this time at it. But I
 7 must say that I am going to go ahead and hear any objections
 8 to the class notice as proposed by the plaintiffs.

9 MR. RAVEN: So Your Honor is ruling
 10 against me on this point.

11 THE COURT: I am ruling that I intend
 12 to go forward.

13 MR. RAVEN: Okay.

14 THE COURT: To permit anyone that wishes
 15 to suggest proposals, changes, or whatever in the class
 16 notice. I am not going to act in this capacity until the
 17 panel rules, which I think will be reasonably soon. I don't
 18 know whether they have. Do you know whether or not they
 19 have a date?

20 MR. FERGUSON: October 1 on the panel.
 21 So the panel hearing would be way down the line, Your Honor.

22 THE COURT: That disturbs me. But I
 23 will not be available, as you well know.

24 MR. FERGUSON: We think a lot of things
 25 can be being done during this period of time. And that is

1 why we wanted to present to Your Honor a plan of operation
2 that we believe can be put into effect that will utilize
3 this time and will move this litigation forward. And we
4 would like to be heard on our suggestions.

5 THE COURT: All right. In any case, we
6 are going to recess now. I ask you to go ahead with your
7 discussions. I will not read the data on the settlement
8 until after we meet again. I want everyone in the house
9 that has any objections or proposals or suggestions for
10 improvement of the notice as it now stands, as it is now
11 proposed-- I have gone through the settlement of many
12 notices in class actions. They invariably go on and on
13 indefinitely. Sometimes they go to the Circuit out here
14 two or three times while we stand by. Everyone of them
15 that has ever gone to the Circuit is sent back, the panel
16 that hears those matters refusing to interfere with the
17 trial judge and that at an early an exploratory period in
18 class action.

19 It may well be determined at some later
20 time that we will just vacate the class action entirely, but
21 not on the basis of argument and speculation and conjecture
22 and a recycle of the pitfalls that may arise. So it isn't
23 as though it were something that is irretrievably and can't
24 be remedied if there is any need to remedy. And perhaps
25 with that thought in mind, I had better go ahead and certify

1 the class action, put it into effect. And there is any
2 modification required by reason of what the panel does, we
3 will modify them accordingly. On a second thought, I think
4 that is what I am going to do.

5 MR. KOHN: We will give to Mr. Raven
6 the agreements, the proposed form of notice, the proposed
7 form of order. I am hopeful that when we come back tomorrow
8 morning there will be a minimum of decision making for
9 Your Honor that we will, having heard what Your Honor said--

10 THE COURT: I hope that, too, but I
11 won't be too surprised if it doesn't occur.

12 MR. KOHN: I think that most of the
13 issues and what is left as to the form of notice, I hope,
14 will be relatively minor. And we will not give Your Honor
15 anything, then, until tomorrow morning.

16 MR. FERGUSON: I want to mention in
17 passing that the gentleman that made the suggestion over
18 there, that is not as idiotic as you seem to think it is.

19 MR. RAVEN: I didn't say it was. I
20 happen to know he is a very fine lawyer, one of the best in
21 the room.

22 THE COURT: He has been on many occasions
23 before me, some of them in class actions--

24 MR. RAVEN: I know his reputation well,
25 Your Honor, but I know he has a reputation for representing

1 his own clients and not mine.

2 MR. FERGUSON: Would you consider
3 looking at the proposed notices and order during this
4 interim?

5 THE COURT: Yes, of course.

6 MR. FERGUSON: Can we do that?

7 MR. RAVEN: As I understand Your Honor,
8 you are directing your ruling against me on my point that
9 this is not the time. You are ruling against me and you
10 are directing us to sit down and look at the notice and
11 raise with the plaintiffs' counsel any objections we have.
12 And then to the extent we can't work them out, we bring
13 them to you tomorrow. I am waiving the arguments.

14 THE COURT: Of course not.

15 MR. FERGUSON: We will give you a copy.

16 THE COURT: In most instances, they
17 are served on me forthwith as soon as someone comes up with
18 one. We start working from that, and I usually do about
19 half of the composing before we are through.

20 MR. JEFFERS: Your Honor?

21 THE COURT: I have not been reversed
22 on a class action notice yet.

23 MR. JEFFERS: Your Honor, is the motion
24 to add Imperial to be deferred as Mr. Ferguson has requested,
25 or may we have a ruling?

1 THE COURT: We will rule about it
2 tomorrow.

3 MR. JEFFERS: I am sorry, I didn't
4 realize that was still on.

5 THE COURT: The room is going to be in
6 use until 10:00. Any of you that want to come earlier
7 can use the several conference rooms in the vicinity, or
8 we will find some other space for you. We will start at
9 10:00 and I hope you have a pleasant evening.

10 MR. FERGUSON: Your Honor, I am
11 handing up to Your Honor a letter in the proposed form of
12 order. I am not handing you No. 7, which is stipulation
13 and agreement of settlement. I am handing you only the
14 notices in the letter.

15 MR. COOPER: Those are the two copies.

16 THE COURT: Good afternoon, gentlemen.

17
18 (Court is adjourned for the
19 day.)
20
21
22
23
24
25

HEARING IN CHAMBERS

attended by

THE COURT, PLAINTIFFS AND DEFENDANTS' STEERING COMMITTEE

THE COURT: We will start off with your summarizing to me where you stand now at this point.

MR. KOHN: Your Honor, please, pursuant to the suggestion you made yesterday, counsel for plaintiffs and defendants, that is lead counsel groups, met for several hours yesterday. We have resolved a number of the differences between us with respect to the form of the various notices. Your Honor will also recall that previous to yesterday's meeting we had objections which were served but not filed. And a number of those we had already previously incorporated into our notice, so that really this has been in the form of two waves. Now, as I understand it, defendants, with respect to the forms, -- and it is three forms that we are dealing with -- of notice, still have two or three objections, which I think it comes better from them to summarize than from me. With respect to the pretrial order, we thought that we had pretty much reached yesterday an understanding, at least, of certainly what I thought were relatively minor points of difference on draftsmanship on one or two major matters as to who was to have responsibility or control with respect to certain items.

I understand that this morning Mr. Cooper was told

by Mr. Raven -- and I may be using the wrong word -- that there was a philosophic difference with respect to the form of the pretrial order which would put into effect the notice procedure.

Subsequent to that, this morning I had a chance briefly to speak to Mr. Raven. And once again it may simply be a case of my not or our not writing with sufficient clarity rather than any fundamental difference. And perhaps Mr. Raven would tell us also with respect to that what his problem is. And I think actually we have taken care of it.

Now, it may be that it should be sharpened or clarified. And he may want to suggest some words which I indicated this morning I probably would have no objection to since I think we are not differing as to what he really wants done. And with that introduction, I think Mr. Raven can speak.

MR. KIRKHAM: Let me just say, again, this is not a matter of concern to really all defendants and really all plaintiffs. And I wonder what utility is served by arguing these things rather than just setting out -- that couldn't be served right from the bench. Nobody is going to be popping up or interrupting Your Honor. I really strongly urge that whatever these matters really go to -- they may be small steps, but still steps of interest to everyone in the lawsuit, then we get out

1 there and we are asked what went on. They can read the
2 transcript after it is all done. So I really do urge that
3 we just, if this is where we are, that we just go right
4 into open court and proceed in the same way.

5 MR. KOHN: The only thing we want
6 to make clear to the judge, we are not starting with the
7 piece of paper we had two or three weeks ago. The piece
8 of paper current today -- there is no use talking about
9 what we talked about two weeks ago.

10 THE COURT: We will go out and go
11 back over whatever has been said thus far and carry on
12 from there. How do you feel about it, Mr. Raven?

13 MR. RAVEN: Well, you know, I quite
14 frankly was going to repeat everything I said here. I was
15 going to repeat it out there. If it would make it any
16 easier for you to know what we are going to say, I don't
17 have any hesitancy in saying it.

18 THE COURT: Let me suggest this: Why
19 don't you hold your conference. I will sit on the bench if
20 you want me to, but you hold your conference and discussion
21 about these things right out there at the main table where
22 everybody can hear it. You can indicate modifications that
23 you have accepted, that have been suggested, and then the
24 defendants can state what further things they wish and go
25 point by point down and thrash out what the wording should

1 be and what you agree with. And then when you get all through
2 with doing that in the presence of the whole courtroom, and
3 then when you get down to the --

4 (Off the record.)

5 MR. KOHN: Do you think we have had to
6 cover the matter we have already covered yesterday?

7 MR. RAVEN: Let me give the judge an
8 overview of how I see it. I think it would be helpful to
9 him, and I will repeat it. Your Honor, as you know, we
10 got this pretrial order yesterday at four o'clock. Your
11 Honor is just getting it today. As a matter of fact, it is
12 pretty well drafted, as you would expect from these very
13 fine lawyers on the other side. And it is deceptively
14 simple. But it does a lot of things. And I think that
15 really what it is designed to do -- and I may be wrong
16 on this. We are willing to talk to them about this --
17 is to blanket in the whole notice problem. And I don't
18 think either you nor we are prepared at this time to do
19 that.

20 And what I am going to suggest is that we just
21 have a few days, just a few days to file a paper. I would
22 like to have us be able to talk to you and we will come
23 back to Tacoma and meet your time and counsel's time. We
24 are not talking about weeks or anything else, just talking
25 about, you know, a very short time. But this thing, Your

1 Honor, is just deceptively simple. It kind of delegates
2 to the plaintiffs all of your functions on the method of
3 actually giving the notice. And that is a very important
4 matter as Your Honor knows. And Your Honor has already
5 spoken to that very carefully in your order, that you want
6 personal notice. For example, there is a class notice
7 committee set up. It looks very fair at first blush.
8 All members of the plaintiffs' executive committee go
9 on as such, others as they will designate, and equal
10 number for the defendants. It puts the three settling
11 people on there, who vote for these people there on the
12 other side -- I am not criticizing. If I settled, I
13 would be on the other side. It is like what Lincoln said
14 about tar and feathering --
15 MR. KOHN: It may be our poor draftman-
16 ship. I think you are incorrect in two respects.
17 MR. RAVEN: Harold, I don't think we
18 ought to argue, Harold. I think you can state your position
19 and we will state ours in five minutes.
20 THE COURT: We are wasting time if we
21 are going over these things. I think that what we had better
22 do is go and get the arrangements of the tables out there so
23 you can sit around it. Then I will sit by and listen to your
24 discussion. When you reach a point where you want me to
25 make a ruling about it, I will be listening just like everyone

1 else. You can explain what you have done and what you have
2 agreed to and all of the rest of it. Let's do it that way.
3 MR. RAVEN: May I just say a word to
4 that?
5 THE COURT: Yes.
6 MR. RAVEN: I think it would be terribly
7 unfair to have this dumped on us at four o'clock and told
8 that we had to negotiate it out the next day. Your Honor,
9 I am just a farm boy, and I can go back to the farm. But
10 I think it is very unfair that it would even be suggested
11 that we be subjected to this. And, Your Honor, I think that
12 we, in common decency, ought to have a time to consider
13 this and discuss it among ourselves. Last night we worked
14 until ten o'clock on the other thing you directed us to
15 work on, the content of the notice.
16 As Harold said, we got a lot of things done. I
17 haven't had a chance to read the settlement agreement yet,
18 and we are supposed to -- I don't think anyone can accuse us
19 of stalling in this case. It hasn't been stalled. I am
20 asking just for some common decency of a few days to respond
21 to this.
22 MR. FERGUSON: Would you say Friday
23 of this week in Tacoma?
24 THE COURT: I would want it on Friday.
25 MR. RAVEN: All right. I think that

1 is --

2 MR. FERGUSON: Friday in Tacoma.

3 THE COURT: I don't want to waste the
4 rest of this day.

5 MR. RAVEN: We will sit down and talk
6 to them about it.

7 THE COURT: I think you people should
8 stay. You should stay right here, confer separately and
9 whatnot and spend a day trying to resolve as many of these
10 things as possible. It is quite apparent, or seems apparent
11 that a great many of the proposals that have been made by
12 the defendants are adopted, are going to be adopted and
13 provided for. If they are in language that you think is
14 tricky or something, clarify them. But you are going to
15 have to do that eventually. And I would suggest that you
16 make a real effort on it today. I will stay as long as you
17 want me to, but you should carry down through, because,
18 frankly, I am determined. I have made up my mind now.

19 I have thought about it constantly before I got
20 here and since I have arrived, and I am satisfied now that
21 come what may, I want to have this class action notice,
22 including the proposed settlement completed and in the mail
23 by, at the very latest, next Monday.

24 MR. RAVEN: Well, Your Honor, I think
25 that, not only for us, but you are entitled to protect

1 and see that we have a little more due process than that.

2 Your Honor, would you think it fair to be handed this material
3 at four o'clock yesterday. We get this at four o'clock, and
4 now we are being told we have to sit down and debate today,
5 we can't even caucus among ourselves. We were working on
6 other things last night, and we are told we have to come to
7 a decision on this today.

8 THE COURT: What other things were you
9 working on late last night? This is the only thing we had
10 left on our calendar.

11 MR. RAVEN: We didn't get to this. We
12 have three different things up in the air. Let me talk to
13 them. We were handed three pieces of paper. Handed this,
14 the pretrial order, we were handed the revised settlement
15 for the first time last night and told that the three forms,
16 we had notice, we had gotten the week before were the ones.
17 We were directed to talk to the content of the notice. That
18 is what we spent last night on. We got a little chance to
19 read this before we came over, and we had a few discussions
20 on it, but as I say, it is something that is very important
21 in this case.

22 THE COURT: If you want to caucus among
23 yourselves separately, that is all right with me. You can
24 do that.

25 MR. KOEN: May I make a suggestion?

1 THE COURT: And come up on Friday.
2 What is our calendar for Friday?
3 MR. GILL: Naturalization.
4 THE COURT: That is no problem.
5 MR. RAVEN: I have a hearing in Stockton.
6 Could we make it Monday? I think I am clear Monday.
7 THE COURT: A weekend makes a big
8 difference.
9 MR. RAVEN: I think we will have to
10 make our record if we are not going to have due process in
11 this case.
12 THE COURT: Well, four days to go over
13 these papers.
14 MR. RAVEN: We got these yesterday,
15 Your Honor.
16 THE COURT: All right, I can't under-
17 stand why it should be that difficult. It wasn't that
18 difficult for me to see these things.
19 MR. RAVEN: Your Honor hasn't even had
20 a chance to read this. You just had it this morning. This
21 is a pretrial order which says, among other things, which
22 they are asking you to sign, which says that you find and
23 determine that notice of the forms attached satisfy the
24 notice requirements, just go through and wrap the whole
25 thing up.

1 MR. KOHN: You keep on saying that.
2 Judge, could I suggest this. Let's go outside, let Mr.
3 Raven make orally the objections or contentions that he has
4 with respect to the order. Apparently the order is the
5 principal problem at this moment. Let us answer them very
6 briefly. And I think out of that -- and I think the oral
7 discussion is good. The realization may come that actually
8 we are not at swordpoints with each other. We just
9 misunderstand what each other is saying in here. Then give
10 him until Friday or whatever -- and I have no strong feeling
11 one way or the other. That is up to Your Honor to supple-
12 ment that in writing with whatever he wants. But this, I
13 think will clarify what I think is the same sort of
14 misunderstanding we had yesterday. Remember, when Your
15 Honor withdrew from the bench and told us to see if we
16 could agree. In five minutes it was done. It was apparent
17 I had just simply been unclear.
18 When I restated it, Mr. Raven realized what the
19 situation was, and that whole problem just dissipated in
20 five minutes. Let him say what he wants to say on the
21 record outside, and we will answer it. And I think it will
22 disappear.
23 THE COURT: Counsel for the defendants,
24 whoever they are, including, of course, Mr. Raven, can take
25 such time as they think is reasonably necessary to state what

1 their objections at the present time are. And then you can
2 respond to them and keep track of them. And those that you
3 have accepted, and are ready to adopt will be adopted. And
4 when we finish that, we will take a recess. Then you can
5 discuss, not with me, out in the court, what further can be
6 done today. You should in all good faith point out those
7 portions of either document on either side of the house that
8 you have objections to and things should be modified. And
9 I guess that is the way we will have to do it. This is the
10 way we will do it.

11 MR. FERGUSON: May I suggest something?

12 THE COURT: Are you satisfied with that,
13 though?

14 MR. PAVEN: No, but --

15 THE COURT: What do you want?

16 MR. RAVEN: I think we should have some
17 time. Mr. Kohn is willing to give us some time.

18 MR. COOPER: Your Honor, could I try
19 to clarify something? We are mixing up two things. We are
20 mixing up, first of all, the forms of notice, which have been
21 on file and defendants have had copies of them for a minimum
22 of ten days on the form of notice. There is no question
23 that all the briefing has been done. It has been going on
24 for almost two months. We can resolve these objections
25 that remain to the forms of the notice.

1 I believe the only thing that Mr. Raven is talking
2 about when he says he wants more time is the order itself,
3 and that is a separate issue. I think we can go out and we
4 can have rulings. I don't think I have any objection to
5 rulings on the forms of notice. When you are talking about
6 not wanting to go forward --

7 MR. RAVEN: May I ask a question here?
8 Just talking here in this room as people have to represent
9 their clients, would any one of you very competent counsel
10 do anything different than I am doing, saying that we should
11 have some time to sit down among ourselves, just a few days
12 to get in a written response on this. Would any of you --

13 MR. FERGUSON: Let me answer that, Bob.
14 The things we are talking about here are very formal matters,
15 matters that come up in every class action order, that many
16 judges throughout the country have ruled on, that have been
17 time tested. It is detail, and this is a kind of detail that
18 we have to think about, that you have to think about. But it
19 is nothing that you couldn't, in twenty-four hours, ten hours,
20 a few hours, solve some of the answers. This is fair, and
21 particularly when I told you this morning that if you wanted
22 to come to Tacoma in a few days, we could postpone the signing
23 of the order itself to give you any chance to study. But
24 we just couldn't agree to give you any lengthy time.

25 MR. RAVEN: I don't want any lengthy

1 time. I have a very important hearing in Stockton. It has
2 been scheduled. It is a big case transferred over there
3 in the state, and I have to be there. And I would like to
4 be at this meeting. And if we could make it Monday.

5 MR. KOHN: Thursday. I worked very
6 hard on this, and I don't intend to come because I think
7 one of the ways of proceeding, I think you have to be willing
8 to let your comfreres take responsibility and make decisions.
9 So I won't be there. Either Thursday, Friday, or Monday
10 would be a date -- assuming the judge could do it. If you
11 could do it on Thursday, two clear days to review --

12 MR. RAVEN: I have an all-day meeting
13 with Lasky.

14 THE COURT: I am not entirely without
15 other things to do. I am working as hard or harder than
16 you fellows are. I have a very heavy schedule of things
17 that I must do, and none of them are personal. They are
18 all in connection with various litigation. So you must give
19 some thought to my suggestions about the time of these
20 things.

21 MR. RAVEN: I appreciate that.

22 THE COURT: And I want to give some
23 thought to be as accommodating as I can. But I am definitely
24 determined that we must move forward and get this on the
25 way. And you will all do whatever you choose about it.

1 But I propose to move forward with it.

2 What do we have on Monday?

3 MR. GILL: It is clear.

4 THE COURT: All right, that is what you
5 asked for?

6 MR. RAVEN: Yes.

7 THE COURT: You have it.

8 MR. RAVEN: All right, fine.

9 THE COURT: Now, the memoranda are
10 going to be submitted when?

11 MR. RAVEN: We will get ours in on
12 Friday, and we will deliver --

13 MR. COOPER: Well, deliver us a copy,
14 we will respond orally Monday.

15 MR. KOHN: I think we will say today
16 all that we propose to say.

17 MR. RAVEN: We welcome the chance to
18 talk to them. Now, for example, Mr. Ferguson has represented
19 that many courts have approved this. I would like to know
20 which courts have approved?

21 MR. KOHN: I will tell you that right
22 now.

23 MR. RAVEN: You give me a list.

24 THE COURT: Why don't you exchange that
25 kind of thing today before you leave?

1 MR. RAVEN: Well, but, Your Honor, we
2 may even resolve it. You know, if we can we will. But I
3 don't like to get placed against a wall like this.

4 THE COURT: I am going to make it
5 Monday, and that is all you sought in the first place,
6 wasn't it?

7 MR. RAVEN: You know, I am not playing
8 games. I am happy to get that. I think we are entitled to
9 it. I don't think I should have to beg for it.

10 THE COURT: You don't have to beg for
11 it. We are trying to talk with each other in some sort of
12 a cooperative manner.

13 MR. RAVEN: I will say this. I won't
14 object hereafter that we didn't get more time.

15 THE COURT: Are you going to file the
16 memorandum on --

17 MR. RAVEN: Friday.

18 THE COURT: So that I can get mine on
19 Sunday or some other time?

20 MR. RAVEN: We will telecopy it here.
21 Mr. Malanga, even though on the other side, has cooperated
22 -- we will telecopy to him like we did the agenda, and he
23 can have it delivered across the street, Your Honor.

24 THE COURT: You could get a flight
25 up there in the morning so you wouldn't have to be away on

1 Sunday and that sort of thing. And I don't know how they
2 run the other way, but I know coming down this way you can
3 get one --

4 MR. FERGUSON: Around ten o'clock. Do
5 you remember when you came up to the meeting?

6 MR. KIRKHAM: It comes into Seattle,
7 Sea-Tac Airport?

8 THE COURT: It is 45 minutes from
9 Sea-Tac to Tacoma.

10 MR. COOPER: We can check the plane,
11 schedule.

12 THE COURT: Why don't we say 11 o'clock.

13 MR. KOHN: I have an airline guide in
14 my briefcase.

15 THE COURT: Now we have that settled.
16 At that time, whatever remains unresolved, you will have
17 an opportunity to first of all meet together and see if
18 you can resolve it, and if you can't resolve it you come
19 out and we will present it in open court. I will make the
20 rulings.

21 MR. RAVEN: There is one other thing I
22 think we could do this morning, although we have agreed on
23 a number of things. As Mr. Kohn said on the content of the
24 three notices, there are about three things that we haven't
25 agreed. And I think we can present those to you today out

1 there in open court. Bob Mallory will present all but one
2 and I will present the other one.

3 THE COURT: All right.

4 MR. FERGUSON: I have one short matter
5 also.

6 THE COURT: Yes.

7 MR. FERGUSON: The plaintiffs have
8 been discussing the time periods we set up in the order
9 you signed yesterday and also the time periods set up in
10 this proposed order that you are going to look at, and we
11 have come to the conclusion that we have some fat in the
12 time and we would like to come up on the record today with
13 some suggestions for corrections or shortening the time so
14 that everybody will have a chance to consider that between
15 now and next Monday. So that if Your Honor finds and
16 everybody finds that we can live with shorter time periods,
17 there is about four or five different time sequences. If
18 we can live with the shorter time sequences, we would like
19 to do so.

20 THE COURT: And you are just going to
21 propose them and state what they are. Then I will give you
22 time to consider them. You wouldn't need to respond unless
23 they appear reasonable.

24 MR. FERGUSON: We wouldn't ask them to
25 respond until Monday, and we would be prepared to --

1 THE COURT: You would not be obliged
2 to.

3 MR. FERGUSON: They should respond to
4 them, really, in their memo Friday, and we will be prepared
5 to discuss them.

6 MR. KIRKHAM: These orders you have
7 already asked the judge to sign?

8 MR. FERGUSON: He signed an order
9 yesterday. There were two time periods in the record
10 yesterday. There are three time periods in the proposed
11 order of today. We want to re-examine. We want to come
12 up with some suggestions. And we would like you to consider
13 the suggestions and Your Honor to consider them, so that we
14 would be ready to finalize them on Monday.

15 THE COURT: All right. Just recap, now,
16 when we go out. Who is going to speak? You are going to
17 speak, Mr. Raven, to objections not yet resolved?

18 MR. RAVEN: I think we ought to do these
19 three things. I think that someone should state on the
20 record, I guess Your Honor is the one, that as I understand
21 what you said in here this morning, that you have definitely
22 ruled against us on our, on holding up on this.

23 THE COURT: That's right.

24 MR. RAVEN: So I think that is the first
25 thing, because I think the other defendants ought to know

that.

THE COURT: All right.

MR. RAVEN: Then I think there ought to be --

THE COURT: I suggest you make some notes.

MR. RAVEN: Then I think we ought to memorialize in front of everyone out there the fact that although we are going to have an opportunity to meet with the plaintiffs today and ask them some questions about this pretrial order here, that it is agreed that where we have until Friday to telecopy, to serve Joe and telecopy you your written objections to it, and then we are going to have an opportunity to present them or to be heard on it Monday. And that takes care of that.

Then I think we are prepared to stand up and state our objections where we have been unable to agree with the plaintiffs on these things in the form of the notices.

MR. FERGUSON: Can you first state the agreements and then the objections?

MR. KOHN: Do you think we have to state all the agreements? It is fairly long and detailed. There is a copy.

MR. RAVEN: We have agreed --

MR. COOPER: Your Honor, I might interject one of the documents we have prepared -- we have prepared a clean copy, what was Exhibit A to the replied memorandum which was in the form of the notice before, so as a result of the conference last night there were additional agreements, and they have been incorporated in what is still labeled Exhibit A because it was Exhibit A to the reply memorandum.

Unfortunately, we didn't put a date on it. Really, dates should be put on there, but this is a clean copy which incorporates all agreements. This would be then the one we would still be arguing about.

THE COURT: Have they been distributed?

MR. COOPER: The defendants have received copies, and I gave Your Honor a copy this morning and your Law Clerk so that they have a copy. It might be useful for all of us to write today's date on it so we don't get confused.

THE COURT: All right, and I will stay here all day as long as you are here working, so that if there is anything you want any of my views, anything, or you consider that there is something we can do, another matter or two or three or whatever that we can resolve now, I am here.

MR. RAVEN: I might say this, Your

1 Honor. I wouldn't want to mislead you. We are going to
2 sit down and ask them a series of questions on that. I
3 doubt that we are going to be able to resolve our
4 philosophical differences. I think there are certain
5 questions we are going to want to ask them. I think
6 already in talking to Harold this morning, we can take
7 care of No. 1 here, make clear you are only talking about
8 the content of the notice. We can get some things resolved,
9 but the whole philosophical -- there is a philosophical
10 cleavage here that we want to do some talking among ourselves
11 about. We want to check with respect to other courts that
12 these gentlemen say have signed these orders.

13 And, you know, maybe it will all fade away, but
14 we want time. We want time.

15 MR. COOPER: Just one more subject.
16 We did give you also revised Exhibit C, which is the
17 molasses notice, which reflects the agreements that we
18 were able to reach last night, and they have been approved
19 by the molasses class representatives on the governmental,
20 which was Exhibit B. They were unable to accept the
21 suggestion of the defendants, so there is no revision
22 of Exhibit B. And we would be talking then about the
23 one attached to the plaintiffs' reply memorandum as to
24 current form to be the subject of whatever argument and
25 disagreement still exists.

1 MR. KIRKHAM: May we have a copy of
2 Exhibit C?

3 MR. COOPER: We have given you those
4 this morning. We passed out C, A --

5 MR. KOHN: I passed them over to
6 somebody.

7 MR. COOPER: We brought 30 copies.

8 MR. RAVEN: May I ask this, just to be
9 sure you have given his honor the pretrial order and his
10 staff copies of this, the one we are going to have a chance
11 to, you didn't get it yesterday?

12 MR. COOPER: No, Your Honor. We did
13 not give you any form of order yesterday. We gave just what
14 we started a half an hour ago when I went to get copies
15 because we neglected to bring them in. We brought in a
16 copy of a document which was called pretrial order with
17 no space re: forms notice, and it has at the top righthand
18 corner the words "Plaintiffs' Draft, 8/17/76." And that is
19 the draft of the order, plaintiffs' draft of the order,
20 which will be the subject of the hearing Monday.

21 MR. RAVEN: Right.

22 MR. COOPER: And the subject of whatever
23 defendants' comments to be made on Friday after a conference.

24 MR. FERGUSON: There is one thing. We
25 did not furnish the Court yesterday the settlement agreements.

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MR. COOPER: That is correct.

MR. FERGUSON: I think the time has come to furnish our copies. We have them here. I think the time has come to furnish the Court with the settlement agreements.

MR. RAVEN: We have stated our objection, and as I understand it, his honor has overruled us on that.

MR. FERGUSON: What I would like to do is lodge with you and file with the Clerk the revised settlement agreements. May I do so?

THE COURT: Yes.

MR. RAVEN: The record will reflect, Your Honor, that we have our objection and you have overruled us on that. Thank you, Your Honor.

(The in-chambers hearing was thereupon adjourned.)

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(PROCEEDINGS OF AUGUST 17, 1976.)

THE COURT: Court is resumed. Apparently counsel have been busy pursuing various matters pertaining to this litigation last evening and again this morning. As a result of the discussions with the liaison counsel, which by the way are recorded, I have concluded that I should announce, as I have this morning to them, that I have been pondering the appropriate manner in which to pursue putting out the class notice and getting on with the business of both the class certification and the presentation of the proposed settlement simultaneously.

The defendants have objected vigorously to this, and I have overruled their objections. Exception, of course, is allowed.

There remain a number of matters that appear to be more or less readily resolved by language changes or minor deletions or additions and the like. And as I understand, a substantial number of those have been resolved. I would like to have that presented to all concerned in open court to the extent that it is practicable, unless you have papers that you can distribute. On the other hand, there are other proposals for modification and some disagreement yet concerning the text of the notice that be sent to the class.

We have now agreed after considerable discussion

1 that we should do everything we can to report everything
2 resolved up to this time and get that behind us today
3 and then recess until next Monday at this time. Whatever
4 matters have not been resolved will be orally considered,
5 preceded by a memorandum to be filed not later than the
6 end of the day Friday with copies transmitted to me that
7 day to arrive at my office on, hopefully, that day. But
8 if not, Saturday or Sunday.

9 MR. RAVEN: We will see that they get
10 to you that day.

11 THE COURT: Yes. Now, I think I have
12 stated all that need be stated by me at this point.

13 MR. FERGUSON: Your Honor, one point.
14 You did authorize me to lodge with the Court and file with
15 the Clerk copies of the settlement agreements, and I think
16 that should be on the record.

17 THE COURT: That is correct. And I
18 have authorized that this morning.

19 MR. RAVEN: And I noted my objection
20 on the record and that was overruled.

21 THE COURT: Correct. You get, then,
22 to the point where perhaps we should report what has
23 transpired, perhaps having the good news first.

24 MR. RAVEN: We are waiting for that,
25 Your Honor.

1 THE COURT: Let us make a brief report
2 on where we stand in the way of reconciling differences.

3 MR. KOHN: Over a period of some weeks,
4 now, plaintiffs and defendants or various liaison groups of
5 them have been meeting with respect to the form of notice
6 as distinguished from the procedure for distributing that
7 form. Some weeks ago, the plaintiff indicated to the
8 defendants that they had accepted a number of objections
9 which the defendants had served but had not yet filed with
10 Your Honor. That acquiescence on the part of the plaintiffs
11 completely satisfied one group of defendants; namely, the
12 settling defendants, and with the settling defendants there
13 is no disagreement so far as the plaintiffs are concerned
14 as to the form of notice.

15 With respect to the other defendants, we met last
16 night for several hours and resolved further differences,
17 acquiescing in many of the things that the non-settling
18 defendants wanted. The forms of notice as finally agreed to
19 on the points as to which we could have agreement last night,
20 are included in the so-called Exhibits A and C, which Mr.
21 Cooper, I think, has distributed to many or all of the
22 counsel in the room, now, and to Your Honor. So that that
23 document represents something which has the agreement of
24 plaintiffs, has the agreement of the settling defendants,
25 has the agreement of the defendants except in certain

1 respects, two or three, which Mr. Raven will probably call
2 to Your Honor's attention this morning. I should also
3 say with respect to one matter as to which we agreed last
4 night on behalf of the industrial and retail and people
5 comprehended in those classes, the government class, has
6 some reservation. In essence, that point was that the
7 fact that they are a member of the class, does it mean that
8 you are going to get any money. To put it rather colloqui-
9 ally, we agreed to that. The defendants wanted it. The
10 government people apparently do not wish to include that in
11 the notice. I think it is relatively minor. We will
12 either work it out this morning or Your Honor can rule on
13 that.

14 The second item is the order putting that notice
15 into effect so far as distribution is concerned. We met
16 briefly with the defendants last night and discussed what
17 we thought were several reservations they had with specific
18 language in that proposed order. Apparently, we didn't
19 continue to negotiate with them long enough to tire them
20 out because after we left they apparently met and thought
21 further about it, and this morning they informed us they
22 now have -- I think they used the word that they now have
23 a philosophic difference with respect, not to the precise
24 details of the form of the order, but with respect to the
25 whole basis or theory of the order.

1 I think, and I think plaintiffs think, that once
2 again we may have not a basic difference of philosophy, but
3 simply a lack of understanding or confusion with respect
4 to draftsmanship. We apparently did not say sufficiently
5 clearly what we thought we had said because what the
6 defendants say they want is what we thought we had included
7 in that order. So that Mr. Raven and his committee can
8 meet with us for a brief period. We may be able to iron
9 that problem out. That is also the problem that he wishes
10 to comment, both in the brief by Friday to which Your Honor
11 has referred and the hearing on Monday. Perhaps a brief
12 discussion among ourselves, and perhaps some statement to
13 Your Honor may obviate that necessity. I do not know.

14 The other matters in the form of the order I
15 think can be relatively easily resolved. The draftsmanship
16 -- I thought that we had reached agreement on those, and I
17 think the form of order distributed with today's date covers
18 the drafting problems as distinguished from the basic problem.

19 In essence, Mr. Raven thinks that the purpose of
20 the order or the purport of the order is that the plaintiffs
21 are given responsibility for deciding how the notice is to
22 be distributed. If he believes that, as I say, it is because
23 of our poor draftsmanship. We thought all the committee was
24 doing -- it was a joint committee -- we thought that all the
25 committee was doing was making recommendations to Your Honor

1 and Your Honor would then issue an order which, ce again,
2 the joint committee of plaintiffs and defendants would
3 execute. That, I think is a resume of where we are.

4 THE COURT: Yes. One other thing I
5 perhaps should mention. That is, I expressed to the liaison
6 people that I thought that the time allowed for various steps
7 could well be substantially shortened. And I have asked that
8 you consider that and come up with some proposal about it,
9 hopefully today.

10 MR. SALZMAN: May I be heard for a
11 moment?

12 THE COURT: Of course.

13 MR. SALZMAN: I am Gerald Salzman. We
14 represent the states of Illinois and Indiana on this. And
15 although Mr. Kohn may have spoken for the settling classes,
16 I don't think he spoke for the state classes. And I have
17 spoken to some of the AG's representatives. And this matter
18 isn't so simple from our point of view because the form of
19 order that has been proposed and negotiated was negotiated
20 without real consideration or concern for the special
21 problems of the states and the states' representatives.
22 And it really doesn't make any sense with respect to the
23 way they should send out their notice to their entities and
24 how they should deal with responses from those notices, the
25 kind of committee that has been established. It doesn't make

1 any sense when you have an Attorney General dealing with the
2 cities and municipalities within the states. There should
3 be an opportunity for the states to deal with the
4 defendants separately on that, and this form of order
5 doesn't apply. Moreover, we didn't have a problem with
6 the form of notice failing to state that somebody might
7 not recover money if he won't. It is already in the form
8 of notice. The state's problem is what we consider a
9 redundant sentence and a confusing sentence inserted into
10 our form of notice without consultation with us, to which
11 I object.

12 MR. RAVEN: Can I ask counsel to
13 identify the proposed order because we have got a handful
14 of them.

15 MR. SALZMAN: The only one that came
16 to me called "Plaintiffs' Draft 8/17/76."

17 MR. KOHN: It is the one submitted to
18 Your Honor this morning entitled "Plaintiffs' Draft of
19 8/17/76, Pretrial Order Re: Forms . . ."

20 MR. RAVEN: I wonder if we are going
21 to get a chance to respond to that?

22 THE COURT: Of course, you also will
23 have an opportunity to contribute to the argument.

24 MR. RAVEN: We had an open invitation.
25 I am sorry, but we didn't pick the people that came to see

1 us on the other side. We were prepared to talk to any of
2 them. I was a little surprised there was no one from the
3 state.

4 MR. KOHN: You cannot divide us any
5 more than we are.

6 THE COURT: Apparently you did not get
7 the invitation.

8 MR. SALZMAN: It may have been open,
9 but it was very quiet.

10 MR. KOHN: Your Honor, please, I think
11 the form of order that we drafted contemplates that in the
12 recommendations there will be recommendations for special
13 situations, such as the government or such as Mr. Cochran's
14 client, the molasses people class and we had a chance to
15 talk to Mr. Cochran very briefly.

16 MR. COCHRAN: We would like to be
17 factored in just a little bit. And some of the language
18 Mr. Kohn has acquiesced in, and we may work out what little
19 differences we have.

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1 MR. RAVEN: May I ask this one
2 thing. After they get their house in order, would they
3 notify us of any changes so that on Friday we can
4 respond to those.

5 THE COURT: Why don't you remain
6 right here today while everyone is here. Put your
7 thoughts into the matter, and I hope and believe your
8 concerns can be adequately covered.

9 MR. SALZMAN: I am sure we can.

10 MR. KOHN: Would you suggest we
11 try to meet, or perhaps Mr. Raven can --

12 THE COURT: Didn't you have some
13 things you wanted to state, Mr. Raven?

14 MR. RAVEN: Yes, this goes to
15 the content of the order. We have some objections.
16 Mr. Mallory will handle two of the matters.

17 MR. FERGUSON: Will you say
18 notice, please?

19 MR. RAVEN: That is what I am
20 saying. Notice.

21 MR. FERGUSON: You said order.

22 MR. RAVEN: I am sorry. I was
23 going to speak to the difference of opinions that we
24 still have with plaintiffs' counsel in the form of the
25 notices, and I will take up one matter and then

1 Mr. Mallory will handle the others.

2 Your Honor, we can use Exhibit A, the indus-
3 trial retailer, wholesaler order as a guide or notice
4 as a guide, although it goes to all the others. And it
5 has to do with a description of the litigation on Page 2.
6 We would add to that, in fact, after the word "customer"
7 at Line 8, we would strike the rest of that sentence,
8 and restraining the sale of private label sugar. "It
9 is also alleged as a result of the conspiracy." We
10 would strike that and put in its place, and the reason
11 we would is that private label sugar affects no class
12 other than the grocery class. But we would put in, and
13 I think we all start with the proposition that all people
14 have subscribed to that, people that got this notice
15 ought to be advised as thoroughly as they can about all
16 things that should motivate them in whether to stay in
17 or opt out. We would add at that point "In addition,
18 certain complaints further allege that defendants and
19 certain co-conspirators conspired to and did: restrain
20 the sale and use of private label sugar; charged customers
21 in some areas discriminatory, lower prices than customers
22 in other areas; adopted a s called basing point system
23 of pricing, and that C & H (an agricultural marketing
24 cooperative) and five parent corporations, except for
25 one, are not themselves growers and members of C & H,

1 and various members of C & H dominated and controlled
2 C & H and conspired in violation of Section I and II
3 of the Sherman Act. Maybe I can hand a copy of this
4 up.

5 THE COURT: I was going to say, it
6 is going to be very hard to keep it all in mind. Can't
7 we get that copied quickly?

8 MR. RAVEN: You may have that
9 copy, Your Honor. Others have it. We talked this over
10 with the plaintiffs.

11 FROM THE AUDIENCE: Many of us
12 don't have it. If we could get copies, we would appreci-
13 ate it. It is very hard to follow.

14 MR. RAVEN: Here is one. Someone
15 just gave me another copy, and I will give you that.

16 Your Honor will recall that some of the
17 complaints in this action --

18 THE COURT: Excuse me one more
19 time. Do you propose to insert this material on this
20 piece of paper with the excision that is marked on it
21 after the sentence that ends with "Labeled sugar?"

22 MR. RAVEN: No, we would put it
23 on that line after the word "customers" and we would
24 strike the rest of that sentence because the rest of
25 that sentence really doesn't apply to three cases. It

1 only applies to the grocery classes. That is why we
 2 are starting our new insert out. The reason we want
 3 to do that, Your Honor, Your Honor may recall that in
 4 some of the complaints, not all, but in some of the
 5 complaints this whole question of C & H Kapra-Volstead
 6 is raised. For example, in Food Mart-Eureka v. C & H,
 7 the amendment to the first complaint, which is C750504,
 8 GH3, on Page 15 there is an allegation that with the
 9 knowledge of the illegality thereof to join and partici-
 10 pate with California and Hawaiian Sugar Company, herein-
 11 after C & H, in violation of Section I and II of the
 12 Sherman Act, as follows, C & H is composed of more than
 13 20 corporations which process raw cane sugar grown in
 14 Hawaii and has a monopoly of such sugar in the State of
 15 Hawaii. C & H is dominated, managed and controlled by
 16 the big five, which (except for Alexander Baldwin) are
 17 not growers of cane sugar and which are not designated
 18 members of C & H. The 20 odd members of C & H have
 19 granted, among other things, all management decisions
 20 for C & H, including sales policy and the setting of
 21 prices. The aforesaid business practice and agreements
 22 constitute a combination and conspiracy in violation of
 23 Section I and II of the Sherman Act between C & H and
 24 the big five. These were known to the defendants and
 25 co-conspirators at the time of the violations described

1 in the complaint.

2 And Your Honor will recall that in Your Honor's
 3 class certification opinion that at Page 12, you set
 4 some of this out. I won't try to repeat it, but at Page
 5 12 you talked about the big five and about C & H and
 6 so forth. So we have this charge in the complaint of
 7 a totally different allegation as to the rest of us, which
 8 really goes to the validity of the Kapra-Volstead exemp-
 9 tion that C & H purports to have with respect to its
 10 operations.

11 Now, that has been challenged in cases before,
 12 one time when C & H sued Am-Star at the time Am-Star
 13 brought out private label sugar in California. That
 14 matter was raised in a cross complaint by Am-Star, and
 15 the matter was quickly disposed of thereafter.

16 Now, we suggest, Your Honor, that the amount
 17 of money C & H has been willing to put up in this settle-
 18 ment has nothing to do with the allegations in the
 19 government case, indeed in most of these complaints in
 20 this action. Indeed, they were prepared to try the
 21 criminal cases and just about did, but rather it is in
 22 the form of getting a license to Mr. Kohn, Mr. Ferguson,
 23 and others, co-signed by others, immunizing their Kapra-
 24 Volstead exemption.

25 Now, we think that in view of that, class

1 members who may have in mind and have taken positions,
 2 who may wish to take positions in the future with respect
 3 to that Kapra-Volstead exemption should be aware that
 4 that is one of the charges in this case. And that is
 5 why C & H is getting a release from all the class
 6 members with respect to that very thing. And we suggest,
 7 Your Honor, in fairness to the class it should be spelled
 8 out to Your Honor. I suggest another thing. Mr. Lang
 9 may speak to this, and he can clear it up if I am wrong.
 10 The rumors are around the industry that the FTC is investi-
 11 gating this matter at this time. Now, Mr. Lang can tell
 12 us what he knows about that. But if that is true, I
 13 don't think Your Honor would want to put on a notice
 14 to the class in which the allegation of these complaints
 15 to that effect were not even mentioned. Yet notices and
 16 a settlement agreement purports to release not only
 17 C & H, a defendant in this action, but sixteen patron
 18 members, a former patron member, the big five of Hawaii,
 19 the parent corporations, and we submit for those reasons,
 20 Your Honor, that notice should contain this information.

21 Now, Mr. Kohn and I talked as to whether it
 22 would be better for us to finish and then him to get up,
 23 and I think we both agreed subject to Your Honor's
 24 pleasure -- maybe he wishes to respond to this at this
 25 time --

1 THE COURT: Yes, I think a response
 2 at the time is much easier to keep in mind.

3 MR. KOHN: They used to say that
 4 hell hath no fury like a woman scorned. I think we now
 5 have a new aphorism, that hell hath no fury like a non-
 6 settling defendant for a defendant who has broken ranks
 7 and settled.

8 It seems to me that all of this is directed
 9 simply to putting a barb into C & H. It doesn't appreci-
 10 ably help the plaintiffs to whom the notice is directed.
 11 As a matter of fact, if you will look at these some
 12 twelve lines that were given to you by Mr. Raven, you
 13 will see that the first five or six are devoted to saying
 14 in five or six lines horrible things about the defendants
 15 that we had condensed into five or six words that he
 16 takes out. So I see nothing to be gained by this sort
 17 of self-destructiveness to bring the whole temple down
 18 on all of the defendants. It is unnecessary.

19 Now, so far as the five lines at the end,
 20 which I take it he is really concerned about because he
 21 wants us to print six more lines instead of the six
 22 words. We will accommodate him on that, but I don't
 23 think that it is fair to punish C & H by singling them
 24 out for special attention with a lengthy discussion of
 25 how C & H is constructed and does its business any more

1 than it would be for me to insist that there be in here
 2 some long dissertation about Am-Star, its many divisions,
 3 its domination, control of the industry, the fact that
 4 somebody, Georgia Packing Company I think, has started
 5 suit against them, charging them with a special price
 6 conspiracy of their own and whatever. I think you can
 7 extend this to really absurd lengths. I think we did in
 8 here what judge after judge after judge has said is the
 9 right way to describe the litigation. You don't get into
 10 invective. You don't get into a lot of colorful language
 11 and so on. If they want to be colorful with regard to
 12 themselves in the first six lines, we'll accommodate
 13 them. But we do think it simply is not fair, it is
 14 unnecessary, it is not correct to be going into fulsome
 15 language. It should be meticulously correct. It should
 16 have both sides of the argument and so on in the follow-
 17 ing five or six lines with respect to C & H. I don't
 18 know whether C & H wants to take any position.
 19 Mr. Lang may want to tell us something. That is our
 20 position. We expatiated with the defendants at great
 21 lengths yesterday. And as I say, we hope that in flinging
 22 the tar around it C & H that they will think a lot of --
 23 it is going to come back and haunt them, themselves.
 24 Aside from all that, it is not necessary. It is discrimina-
 25 tory, and we oppose that. That is the second six lines.

1 MR. RAVEN: May I respond to that?

2 THE COURT: Yes.

3 MR. RAVEN: First, in the debate
 4 last night, it was made clear to us that was not what the
 5 plaintiffs cared about as such. They told us they would
 6 have to be cleared with C & H. They asked me to do that,
 7 and I said that wasn't my business to do that. I was
 8 asked to negotiate with the plaintiffs' steering committee.
 9 They are asking Your Honor to sign your good name, a
 10 senior judge in the circuit, known for being a very
 11 strict anti-trust enforcer. They're asking you to put
 12 your good name on that and to bury this Kaper-Volstead
 13 matter. We didn't single them out. When Your Honor
 14 says this settlement agreement, which Your Honor hasn't
 15 had a chance to read in detail yet, you can see there
 16 is singled out, we have a whole page listing the member
 17 patrons of C & H. C & H was -- no one sued these other
 18 members yet. A good part of this settlement containing
 19 the release is to cover that Kaper-Volstead exception,
 20 something that I submit rulers in the industry is under
 21 investigation by the FTC.

22 Do you mean, Your Honor, if you were a member
 23 of this class, if you were a member of this class that
 24 it wouldn't be important for you to know that some of
 25 the charges in these cases was quite apart from the

1 other conspiracy alleged against all of these people,
2 that there was a very simple conspiracy, a la Sunkist
3 in this circuit alleged against C & H that they had an
4 invalid Kapra-Volstead exemption. Wouldn't you want
5 to know that before you made a decision and told them
6 you were releasing your claim?

7 Your Honor, I think it puts us to the test
8 as to whether we want to tell these class members the
9 truth or whether we are going to slip a piece of paper
10 before them.

11 MR. KOHN: If you will be good
12 enough to turn to Page 6 of this same proposed notice,
13 you will see that where it is relevant in describing the
14 settlement, we tell what C & H consists of. It is
15 already in there so far as it is necessary to apprise
16 anyone as to what the settlement consists of, what it
17 constitutes. And I think that is all that any reason-
18 able person -- what you want to do is inform the plaintiff
19 as to what the settlement consists of. He has a right
20 to have in there, and there it is. And we don't need
21 it in the other language with all of the color that gets
22 attached to it.

23 THE COURT: I should think in a
24 matter of that type that counsel for C & H should express
25 his views.

1 MR. LANG: Bailey Lang. One
2 specific point I should like to say, I am wholly unaware
3 of any FTC investigation such as Mr. Raven says is
4 reported to exist in the industry. Nothing has come
5 to my attention. There is an FTC consent order with
6 regard to advertising, which has nothing to do with
7 Kapra-Volstead. We have negotiated, they have thought
8 that we made invidious comparisons between cane sugar
9 and beet sugar as to their relative qualities. That
10 is the only FTC proceeding that I am acquainted with.
11 So far as C & H's potential different position than
12 others, there are two complaints out of the perhaps 100
13 odd that are before Your Honor in which it is alleged
14 that C & H's patrons, Alexander Baldwin, Castle and
15 Cook, are co-conspirators. They are not named defendants.
16 If you will read all complaints here you will find
17 probably 60 different entities that are named as co-con-
18 spirators. No one has suggested that the notice should
19 draw attention to the fact that those people have been
20 alleged to have conspired with Imperial and to have
21 conspired with Am-Star and conspired with anyone else.
22 I think Mr. Raven's concerns for the class members is
23 somewhat disingenuous. I think if he wants to go into
24 all the dirt and all of the possible claims against
25 each defendant, whether they be settling or non-settling

1 defendants, we could go on a long way. There are many,
 2 many pages of things that perhaps a class member might
 3 wish to think about. Such as that the fact that Am-Star
 4 today is under investigation of the Brooklyn's Grand
 5 Jury, and that the populous and members of the class
 6 contemplate what the consequences of that may be. I
 7 think there is no need to single out a single person
 8 and describe at length a particular shortcoming that
 9 they may, someone may have alleged that they have.

10 Thank you.

11 MR. RAVEN: May I respond?

12 MR. KOHN: If Your Honor please --

13 MR. RAVEN: May I respond to that?

14 First, Your Honor, there is a great difference between
 15 other conspirators who are alleged to have conspired
 16 with the whole group. There is a great difference between
 17 that and having set up, as they have in some of the
 18 complaints, a separate conspiracy among the C & H
 19 members where they attack the Kapr-Volstead exemption
 20 because that is the purport of where they point out
 21 that only one member, one of the big five, is a grower.
 22 And of course, as Your Honor recalls the Sunkist case,
 23 I think by Judge Barnes in this circuit, that is what
 24 the whole problem is in these Kapra-Volstead exemptions
 25 as to whether you are growers or not.

1 THE COURT: Counsel, I am sure,
 2 is a reputable member of the profession. He has made
 3 a categorical statement that he has no information and
 4 knowledge of the kind that you are implying. If you
 5 have some knowledge on that subject that he doesn't, it
 6 will be a remarkable thing, to begin with. And I should
 7 think that you had better tell us where the source of
 8 that information came from.

9 MR. RAVEN: It came out of the
 10 source as you talk among people in the anti-trust bar.
 11 And you hear these things and --

12 THE COURT: Rumor.

13 MR. RAVEN: I told you that. It
 14 was rumor, and counsel --

15 THE COURT: I disregard rumor, and
 16 especially in the case of the statement that this gentle-
 17 man has made. If he has stated falsely he will have
 18 to suffer for it.

19 MR. RAVEN: That's right.

20 THE COURT: But I will be amazed
 21 if that is the case. So I think you are dealing with
 22 rumor. You should not have injected it into this matter,
 23 and I am persuaded now that there is no occasion for
 24 making the insertion that you suggest.

25 MR. RAVEN: Would Your Honor grant

1 me this? Would you wait until you have read the settle-
2 ment agreement and see what it provides for with respect
3 to the release of these members?

4 THE COURT: Yes. I think for your
5 own record you should do that.

6 MR. SALZMAN: I may misunderstand,
7 but I understand that they had hoped to insert this in
8 the state notice as well. I understood that they had
9 hoped to insert the same provision in the state notice.

10 THE COURT: Who is "they?"

11 MR. SALZMAN: The defendants, the
12 objective defendants. Your Honor, I haven't any clarifica-
13 tion of that.

14 MR. KOHN: If Your Honor please,
15 in view of the fact that Your Honor has ruled, and we
16 thought that we were covering whatever was needed in all
17 three, you wanted it in yours?

18 MR. SALZMAN: The only reason I
19 wanted to say something now is because there was a
20 reference to the settlement agreement. And I wanted to
21 point out to the Court that the settlement agreement
22 doesn't apply to the state, and further, that none of
23 the states have made the allegations in question to which
24 this notice agreement is directed. And if this notice
25 agreement was intended to be inserted in the state notice

1 unbeknownst to us, I wanted to go on record that we
2 do object to that for the reasons I have just stated.

3 MR. RAVEN: Your Honor, your
4 question as to where I received such information, I would
5 like to have Mr. Fairman tell you the source of that
6 information.

7 MR. FAIRMAN: Your Honor, Marc
8 Fairman for Am-Star Corporation. Your Honor, approximately
9 two months ago I received a call from a Mr. Briestein
10 (phonetic) who identified himself as a staff attorney
11 with the FTC in Washington. He informed me that in part
12 of the instance of the San Francisco Office of the Anti-
13 Trust Division, he instituted a preliminary investigation
14 of C & H, in particular the domination and control of
15 C & H by the big five in Hawaii. He said that he was
16 particularly looking into allegations that there has
17 been a violation of the Rapra-Volstead exemption by
18 virtue of unlawful conduct in the maintenance of prices
19 and asked whether by virtue of the charges which Am-Star
20 had one time made against C & H in 1970, we might have
21 any information to provide.

22 Mr. Briestein did not suggest that we not
23 disclose this, but at the same time I felt it might
24 impede the progress of the proceedings that were publically
25 disclosed. That was the source of the information. It

1 came directly from the Federal Trade Commission. I
 2 think, Your Honor, the non-settling defendants do have
 3 a very real interest in this situation because without
 4 any factual investigation whatsoever, the one defendant
 5 which was named by the government in all three actions,
 6 all three separate actions, is being proposed to be
 7 released as well as its patron members who have not
 8 even been sued, proposed to be released without any
 9 evidentiary showing whatsoever to justify the sum of
 10 the settlement. This is just one indication of the lack
 11 of full disclosure to the court in connection with a
 12 settlement that it is being asked to tentatively approve
 13 and pursue and to which it is being asked to send out
 14 a notice. And we think that it harms the co-defendants
 15 to force people to make an election to exclude themselves
 16 and to release one party who may be the only liable party
 17 in these proceedings without full disclosure and that
 18 could conceivably harm other defendants who are losing
 19 a joint tort feaser for whom there is joint and several
 20 liability without full disclosure of the facts to the
 21 class. I think we have standing as co-defendants and
 22 as officers of the Court to raise that issue.

23 THE COURT: Thank you. Mr. Lang?

24 MR. LANG: May I comment on that?

25 The issue of the fairness and reasonableness of this

1 settlement will come before the Court at the time objec-
 2 tions to the settlement are made. And a presentation
 3 will be made on that issue. It seems to me ridiculous
 4 to sit here and say a notice on that to go out because
 5 the monetary amounts are not adequately justified at
 6 this time.

7 THE COURT: I agree. I think that
 8 we are spending too much time on this item because all
 9 we are trying to do is get out a notice preparatory to
 10 having a hearing on whether or not the proposed settle-
 11 ment is fair and reasonable in all the circumstances.
 12 And there will be ample opportunity for anyone who feels
 13 that this subject is something that should be discussed
 14 may do so. And that will be in a very near time. I
 15 think that will be ample time, then, to raise this matter
 16 to whatever degree it should be raised within reason.
 17 And accordingly, I am confirmed in my feeling now that
 18 this is not desirable at this time. This is in a state
 19 of flux. Nothing has been determined excepting that there
 20 is an investigation of some kind. That is the only
 21 information we have about it. And to label somebody
 22 as being investigated without more than that to my mind
 23 is undesirable, especially since, on the hearing, there
 24 will be full opportunity for anyone who feels that is
 25 harmful to them. They will have an opportunity to discuss

1 it. That is the ruling. Let's go to the next matter.
2 Mr. Kohn?

3 MR. RAVEN: I am a little bit
4 troubled, Your Honor, by some of your comments. Of
5 course, that is a problem of perhaps being around
6 different parts of the country, I have been in District
7 Court a long time and I have never been questioned once
8 on my conduct. That is why I asked Mr. Fairman to stand
9 up. And I don't think I was in any way improper in bring-
10 ing Your Honor's attention so that Your Honor can deal
11 with it as you wish. I would have thought that I would
12 not have fulfilled my duty as an officer of this Court
13 in not revealing it. I would have thought that you
14 could have with some justification taken me to task for
15 knowing of that and not mentioning it because it gave
16 you an opportunity at least to find out from C & H's
17 counsel if he knew anything about it. And Your Honor,
18 I think if you did intend to reflect on me with what you
19 said, I think it is very improper.

20 THE COURT: I didn't cross examine
21 you, and I didn't cross examine the speakers that told
22 of receiving apparently some inside advice.

23 MR. RAVEN: We were called by the
24 FTC.

25 THE COURT: I am not criticizing

1 you. That is what the gentleman said. He was called.
2 Why he was called by the FTC in connection with this he
3 hasn't explained.

4 MR. RAVEN: We were called as a
5 competitor because, Your Honor, you know, we don't
6 join together over this table willingly. We are put
7 here by the plaintiffs. We are competitors, Your Honor.

8 MR. FAIRMAN: If it please the
9 Court --

10 THE COURT: I have had considerable
11 experience with some agencies of the government, and the
12 fact that somebody of one of those agencies, whether
13 authorized or not, communicates with someone on a
14 telephone call about a matter of this kind is not very
15 satisfying to me to justify all of the time we have
16 now spent on this subject. I apologize to you if I
17 have offended you. I have a high regard for you, but
18 I think in this instance in your original presentation
19 of it, you stated that it was a rumor. It ought to
20 have stopped right at that point. But I thought it
21 was only fair for counsel for the company in question
22 to make some statement. And he said he had heard nothing
23 of it. And therefore, apparently they are asking other
24 people but not them what they are doing.

25 MR. RAVEN: Which is not unusual.

1 THE COURT: Of course not, it isn't
2 unusual. But that is not to say that it is right.

3 MR. RAVEN: I am not defending
4 the FTC nor any other agency of the government, Your
5 Honor.

6 THE COURT: I have made the ruling
7 and I am adhering to it. Let's get on with some other
8 subject.

9 MR. KIRKHAM: May I, to help U and
10 I, Incorporated, and just to clarify it for the record,
11 I understand you have made your ruling, but I think that
12 standing here as a bystander, really, to this colloquy,
13 that it got off on what appears to me -- and I just
14 submit because I feel I should that it got off on an
15 irrelevancy. And that is that this rumor, be it
16 appropriate or inappropriate or so forth, it was com-
17 pletely irrelevant and unnecessary to Mr. Raven's argu-
18 ment. And his point was that these charges have been
19 made in the complaint. And what he asked to go in the
20 notice had nothing to do with there being a rumor. And
21 he did not ask that anything go in that said in effect
22 it is a rumor that the FTC may be investigating and so
23 forth. What he asked be put in the complaint -- and I
24 just state this so the record will be clear -- what he
25 asked to go in was the statement that was contained in

1 the complaints of, two of the complaints here and which
2 ties into the settlement agreement as we read it, which
3 focuses on the special problems which C & H has. It has
4 nothing to do with that rumor and the propriety or
5 inpropriety of whatever of raising that before the Court.
6 And as a bystander I thought I could see that more clearly
7 than perhaps even the Court and Mr. Raven, who was stunned,
8 perhaps, by the Court's conduct.

9 THE COURT: Thank you for your
10 statement. The ruling remains as stated.

11 MR. RAVEN: Mr. Mallory will pre-
12 sent the other points that there was a conflict on.

13 MR. MALLORY: Robert Mallory,
14 Your Honor. I believe there are a few remaining issues
15 concerning the form of class notice. Mr. Cooper referred
16 to revised Exhibit C, which is the agricultural notice,
17 which I haven't seen. But I believe that the single
18 remaining issue has been resolved on that. There was
19 an improper reference to one matter, and I see that that
20 has been removed.

21 MR. KOHN: It has been corrected.

22 MR. MALLORY: So that is corrected,
23 Your Honor. One other problem that the defendants have,
24 Your Honor, is with respect to Exhibit B, which is the
25 notice to the state classes. Mr. Salzman has made a few

1 comments on that here this morning. Just so that the
 2 record is clear on that, what defendant have proposed
 3 is simply adoption of the language that was agreed to
 4 last evening for incorporation in the notice to the
 5 grocers, industrial users and wholesaler classes, which
 6 is, Your Honor, after a description of the requirements
 7 for membership in the class. The statement that however
 8 the fact that you have purchased sugar does not necessarily
 9 entitle you to share in any recovery in this litigation.
 10 And Your Honor, the defendants believe that that language
 11 was required to fairly inform the absent class members
 12 that there are issues in the case; for example, the
 13 defense of Pass On which has been asserted by the defen-
 14 dants, which may disentitle them to participate in any
 15 ultimate recovery. And furthermore, that they will
 16 ultimately have to come forward and prove their claims
 17 in order to participate. Now, the plaintiffs' counsel
 18 that we were meeting with last night were persuaded, and
 19 that language is now included in the Exhibit A, which
 20 is the industrial notice. However, Mr. Salzman, as I
 21 believe he stated, does not feel that that same language
 22 should be included in the state notice. And we feel to
 23 the contrary. So that remains an issue, Your Honor.

24 MR. KOHN: I don't want to speak
 25 with regard to the merits of it since we have agreed that

1 Mr. Salzman can say whatever he wants. We don't want
 2 to be taken as acquiescing in defense counsels reasons
 3 why we are nice people and went along rather than argue
 4 about that particular clause. So I am simply stating
 5 this of record. We also informed him that we did not
 6 have the power to bind the government representative.
 7 We would hope that they would follow the decision made
 8 by others on their own behalf. They can say whatever they
 9 want. I would hope that it would be resolved promptly.
 10 I don't think there is anything else we have to say.

11 MR. MALLORY: Your Honor, I would
 12 be very surprised if Mr. Kohn did acquiesce in our reasons
 13 for wanting that language. However, we nevertheless do
 14 desire it. I might think Mr. Salzman probably should
 15 be heard on that.

16 THE COURT: Yes. Why don't you
 17 just stay there, Mr. Salzman can present his views.

18 MR. SALZMAN: Thank you, Your
 19 Honor. I think I am speaking for all of the states. We
 20 have inserted the following language in the form proposed
 21 by us. The defendants deny the foregoing allocation,
 22 deny liability, deny that the plaintiffs or any potential
 23 class members are entitled to damages. We agreed that
 24 that should be in and it is in the draft. We feel that
 25 the defendants insertion of this extra language is both

1 redundant and confusing because in addition to our state-
2 ment that the plaintiffs may not be entitled to damages,
3 they have a saying however the fact that you have pur-
4 chased sugar does not necessarily entitle you to share
5 in recovery in this litigation. It adds nothing. It
6 puts in another step in the wrong place in the notice.
7 And it doesn't take account of what we have conceded
8 later in the notice.

9 THE COURT: Offhand, it seems to
10 me you might get a consolidated sentence stating the
11 subject matter once.

12 MR. MALLORY: Well, Your Honor,
13 our feeling was simply that --

14 THE COURT: I wouldn't want to
15 reiterate it twice. If you want to get a consolidated
16 sentence including this specifically in your previous
17 sentence, that should do it.

18 MR. MALLORY: Perhaps we can work
19 with Mr. Salzman and come up with acceptable language.

20 THE COURT: It is purely a matter
21 of semantics and where you place it. But if you do it
22 twice in different places, it overemphasizes, whereas
23 if it is stated once that is sufficient in the notice.
24 I will permit that if you will go along with it and
25 supervise it.

1 MR. SALEMAN: I think we can work
2 something out at that one spot.

3 THE COURT: So ordered.

4 (Continued on next page)

1 MR. RAVEN: May I raise a point at this
2 time?

3 THE COURT: Yes.

4 MR. RAVEN: I would hope in the future when
5 Your Honor directs us to meet with the plaintiffs that they
6 bring whoever they need to bring to bind their side. I am
7 disappointed that we met with them last night only to find
8 that we were only negotiating with half of them. We thought
9 we were dealing with the representatives of that, and I
10 hope in the future that can be remedied.

11 THE COURT: Well, you should certainly keep
12 a sharp lookout for that kind of situation.

13 MR. FERGUSON: Well, Your Honor, it was
14 inadvertant.

15 THE COURT: I would think that you could get
16 together with the gentlemen in the back row there and get it
17 done within no time at all.

18 MR. MALLORY: I think we probably can, Your
19 Honor.

20 THE COURT: Thank you.

21 MR. MALLORY: One other point. We left our
22 meeting last night with a strong feeling on the part of the
23 defendants that new inquiries from potential class members
24 were received pursuant to the invitation for such inquiries;
25 for example, which appeared at the bottom of page

1 ten in the industrial user notice and their similar
2 provisions in the other two notices should also come to the
3 defendants. And I believe, Your Honor, that now the plain-
4 tiffs have said to us that any of those inquiries which are
5 brought to their attention will be given to us forthwith
6 in some package after they have been received for our review.
7 And if that is the understanding, Your Honor, we would feel
8 that was satisfactory. We simply thought that we had a
9 legitimate interest in knowing what concerns the potential
10 class members did have concerning the classes and the notice
11 they received.

12 MR. KOHN: I think there is no disagreement
13 between us. This is the customary form. If somebody wants
14 to know what he is supposed to do he calls one of the
15 plaintiffs counsel, not the defendants counsel, since they
16 are on the other side. We did assure counsel yesterday, as
17 is provided in the last paragraph of this order, that
18 everything will be kept intact, that there will be a record,
19 that they will have complete access to it in the proposed
20 order putting the notice into effect and ordering distribu-
21 tion. We do provide the copies of everything will be kept
22 intact as part of the record, so nobody is going to hide
23 anything from them. We just don't think that somebody out in
24 the hinterland wants to know what his rights are, should
25 call Mr. Raven and find out how a plaintiff protects himself

1 in this action.

2 THE COURT: In any case, you got what you
3 desired.

4 MR. MALLORY: With that understanding, we
5 have -- and Mr. Kohn suggested our next concern, which has
6 been dealt with in this proposed order, which is that any
7 objections to the proposed settlement, which is a separate
8 matter from inquiries concerning the class notice itself,
9 should also be available to the defendants. And I now see
10 that both the revised notice to the industrial class and the
11 proposed paragraph nine of the order, which we will be
12 responding to this Friday, provide that copies of all
13 objections will be filed with the Clerk and presumably also
14 be made available to the defendants for their review.

15 MR. KOHN: Yes.

16 THE COURT: With the usual admonition that
17 anyone who desires to make a comment on the settlement
18 proposal must state it in writing.

19 MR. KOHN: That will be provided for in the
20 notice.

21 THE COURT: Provide for a given date. If
22 all those responding in writing will be given a reasonable
23 time to speak orally, if they choose. I have had that in all
24 of my class notices. And up to now, we have never had any-
25 body show up. Maybe this will be a record breaker, but in

1 any case, we have had written comments or such like, but
2 no one has ever come to the argument.

3 MR. KOHN: I am reminded by Mr. Cooper to
4 state for the record what we stated to defense counsel last
5 night: that these records will be in the Clerk's office.
6 They will be available. We offered even further, as one
7 gentleman to another, to give them copies if they want them.
8 But we do not agree that they have any right, any standing
9 as non-settling defendants, to participate in the settlement
10 procedure. We simply want to state that on record, so that
11 what we are doing here will not be taken as any consent or
12 any acquiescence to the position that they somehow or other
13 can second guess the people who are parties to the settle-
14 ment.

15 THE COURT: Your position on that now is of
16 record. However, if and when any such situation arises, I
17 will have to make a ruling about it at that time.

18 MR. RAVEN: And my I speak to that, Your
19 Honor? A moment ago, putting the two things together that
20 you said, you said a moment ago that no one ever comes to
21 these things. And you also told us with respect to our
22 position to the C & H thing that that could be taken up at
23 that time. So I submit to Your Honor, either other people
24 ought to be able to be heard there or it puts a very sharp
25 duty on all of us to --

1 THE COURT: I won't make any anticipatory
2 ruling about it. I will make a ruling if and when the
3 occasion arises. For all we know, it may not arise at all.
4 On the other hand, if it does then I will deal with it at
5 that time.

6 MR. MALLORY: Your Honor, as to the last
7 remaining issue on the form of class notice, I think you
8 have underscored our reasons for the strong belief that there
9 must be some reference in the description of the proposed
10 partial settlements to the manner of allocation among the
11 classes and between direct and indirect purchasers. You have
12 observed that it is seldom, if ever, that class members who
13 receive notice do appear at the hearing on confirmation of
14 the proposed settlement. We believe that is the very reason
15 why it should be of paramount concern to the court. It
16 certainly is to the defendants that those class members
17 receiving notice of the proposed partial settlement are fully
18 advised on how that proposed settlement will impact on
19 them. And, Your Honor, it is particularly important in
20 view of the fact that we are talking about seven separate
21 sub-classes and class under the industrial user, retail
22 user, wholesaler class notice. And we think that someone
23 receiving this notice is simply unable in any informed way
24 to exercise judgment on whether he should stay in the
25 litigation or opt out. The reasons stated for having the

1 notice of the proposed partial settlement in the notice at
2 all, is so that they can be informed of the status of
3 litigation. There is no distribution that has been proposed
4 to be noted to the class in this first notice. It is
5 simply here to tell the absent class members what is the
6 status of this litigation. We feel that is the reason for
7 that notice, or the notice with respect to the proposed
8 partial settlement to be in this notice, it ought to be
9 complete enough so as to allow someone who receives it to
10 make an informed judgment. Upon receipt of this notice and
11 within the period allowed for opting out will be the only
12 time that a class member falling within one of these seven
13 classes will have an opportunity to opt out of the litigation.
14 And that presumably will occur for any hearing concerning
15 the finalizing of the proposed partial settlement. And we
16 think, Your Honor, that it is impossible to put the -- or
17 that the class member is put in an impossible situation of
18 trying to exercise an informed judgment on staying in the
19 litigation or opting out particularly in view of being --
20 of the notice of the settlement monies being held, unless he
21 knows how that will impact on his particular class among
22 the seven. So, Your Honor, we feel that there needs to be
23 some description of the method of allocation made in this
24 first notice when it does go out. And, of course, we have
25 already argued to Your Honor why we think it is premature

1 that it goes out at this time, and I am not going to repeat
2 the reasons for the position of the defendants at this
3 point.

4 MR. KOHN: Passing for a moment, Your Honor,
5 as to whether counsel for the non-settling defendants have
6 any standing whatsoever to discuss this particular subject
7 and going to the substance of the discussion itself. In the
8 first place, there has not yet been any agreement or any
9 proposed agreement with respect to proposed allocation. So
10 therefore, we cannot notify anybody as to what the allocation
11 is to be. Secondly, at page seven of this proposed notice,
12 beginning at line 23, it sets forth in great detail in the
13 traditional language what I have told you, that people will
14 be given an opportunity to comment or to object to any
15 proposed plan of distribution, any plan of distribution will
16 be subject to court approval. At the time of distribution
17 there will be claims for expenses and counsel fees. This is
18 the way it is done in every order that I am familiar with,
19 beginning with what was really, I think, the first, our
20 copper tubing case before Judge Fullem, the antibiotics case
21 before Judge Wyatt, up to decisions by Judge Muecke on our
22 brief in the Arizona bread case. Judge Stewart did substan-
23 tially the same thing two or three weeks ago. And this is
24 the way it is done. There is no allocation. There will be
25 none until appropriate notice goes out as the settlement is

1 approved. Assuming it is approved Your Honor will have
2 complete control of the distribution at that time. Anybody
3 who disagrees with the proposed plan will have an opportunity
4 to come in and be heard. And Your Honor will determine what
5 the allocation is to be.

6 MR. MALLORY: Your Honor, the non-settling
7 defendants continue to fail to understand that line of
8 argument. The absent class members are being advised of a
9 settlement fund that is available for distribution and yet
10 are told nothing about what proportion of that settlement
11 fund, if any, will come into the hands of the sub-class or
12 class that they are members of or potential members of. To
13 say that they have an opportunity to appear and object at
14 the hearing on finalization of the proposed settlement is
15 simply no answer at all. Your Honor has observed, seldom
16 does anyone appear. And furthermore, I think that is just
17 simply impossible for someone receiving notice to know if
18 he should or shouldn't appear if he doesn't know how the
19 proposed settlement is going to impact on him. There is no
20 description whatever in the proposed settlement notice.

21 I would invite the court's attention to
22 paragraph 1.46 of the Manual for Complex Litigation, which
23 Your Honor was so instrumental in bringing into being. And
24 digest the opening comment on the paragraph describing the
25 procedure for approval for the proposed settlement. And I

1 am quoting,

2 "The determination in a class action as
3 to whether a proposed settlement is fair and reason-
4 able is normally at least a two step procedure.
5 The first involves a preliminary determination
6 as to whether the proposed settlement should be
7 given to members of the class and a hearing
8 scheduled at which evidence in support of and in
9 opposition to the proposed settlement will be
10 received.

11 "Unless the judge is preliminarily
12 satisfied that the proposed settlement is within
13 the range of possible approval, there is no
14 point in proceeding with any notice and the
15 hearing, accordingly, rather than automatically
16 accepting assurances of counsel that the proposed
17 settlement is a good one and should be submitted
18 to the class members, it is usually desirable to
19 have a preliminary hearing. At such a hearing the
20 judge should learn the circumstances surrounding
21 the negotiations and hear not only from the
22 parties and counsel who participated in the
23 negotiation but as well as from those, if any, who
24 were left out of the negotiation. Among the
25 pertinent inquiries that might be pursued at such

1 hearing are, one, at what stage in the proceed-
2 ings was the proposed settlement achieved? Two,
3 has there been any development of fact or dis-
4 covery which estimates the probability of
5 liability in the range of possible damages?
6 Can the proponents of the settlement submit
7 data to establish at least preliminarily the
8 reasonableness of the proposed settlement? "

9 And the list goes on, Your Honor. It is
10 quite long. Our point is that there has been no such showing
11 made to this court which would allow the court to make a
12 ruling that the proposed settlements are fair and reasonable.
13 Nor is there any description in this notice, which is going
14 to allow any potential member of one of the seven classes to
15 make an informed judgment on whether he should appear at
16 the hearing for finalization of this proposed settlement
17 and object.

18 THE COURT: Well, I disagree. I think that
19 there is ample opportunity for everyone who wishes to do so
20 to be present at the hearing with counsel if he desires. And
21 that counsel would be welcome. And they may thoroughly
22 explore. But most of all, my responsibility, which I expect
23 to discharge fully for my satisfaction, that it appears to
24 be a fair and reasonable settlement. However, it would be
25 submitted to the plaintiffs.

1 MR. MALLORY: Your Honor, I won't restate
2 our position on that. We simply don't feel that there is
3 adequate information and feel there should be a further
4 description in the notice.

5 MR. KOHN: I think, Your Honor, that we have
6 now covered and Your Honor has ruled in all of the disputed
7 matters with respect to all of the notices. The one problem
8 between Mr. Salzman and Mr. Raven with respect to that, you
9 don't necessarily collect or not collect. The only other
10 matter that would remain with respect to the notices them-
11 selves is the dates that are to be filled in for the hearing
12 and for the opting out and for the filing of the objections.
13 And if Your Honor is ready to receive them, we do have some
14 recommendations.

15 MR. KIRKUM: Your Honor, may I -- Mr. Kohn,
16 if I may just address myself to one general point in the
17 notice.

18 THE COURT: Yes.

19 MR. KIRKUM: We have been, of course, pro-
20 ceeding on what is called in shorthand that we are all
21 familiar with, the opt out procedure. We have been doing
22 that in a sense, and really in anticipation did. I think
23 we should make it clear, I should make it clear, at least,
24 this whole proceeding, that this whole procedure under Rule
25 23, if it be authorized by Rule 23 is not Constitutional.

1 And, in fact, we should have and require under the Constitu-
2 tion and under Rule 23, it read with the Constitution, and
3 read sensibly. You should require an opt in procedure.
4 That is, that isn't entirely improper to bind class members
5 unless they take an affirmative action of opting out. And
6 so I think that this court should rule. And I ask for the
7 ruling that this, in fact, should require an opt in pro-
8 cedure; that we should, the notice should, in effect, say,
9 that in order to be part of this you must opt in rather than
10 you will be part of this unless you opt out, Your Honor. And
11 I do ask that be done.

12 THE COURT: Your objection is noted.

13 MR. RAVEN: Your Honor, may I ask a question
14 as to your intention in your discussion with Mr. Mallory, I
15 was uncertain -- does Your Honor contemplate two step pro-
16 ceedings? Does Your Honor contemplate, before sending out
17 the notice, the first type of hearing or examination set
18 forth in the Manual, looking into the settlement agreement
19 so that you have in mind that in this pre-trial order that
20 we are going to speak to, that seems to be set up that way --

21 MR. KOHN: You have the settlement agreement,
22 you have a tremendous mass of statistics and data which you
23 had when you determined the class. We understand that you,
24 having received that, seeing the amount of the settlement
25 agreement, knowing the range of settlements in other cases

1 with comparable markets, that Your Honor can, and we
 2 respectfully urge you, that you should now make that initial
 3 determination, that this is substantial enough to send out
 4 notices. That is all you are doing at this time. Anybody
 5 who doesn't like the settlement will have ample time to come
 6 in and tell why it is inadequate or it is too much. And I
 7 don't think there is anything more that need be done. This
 8 is generally done in a relatively informal manner. As a
 9 matter of fact, I have never seen any situation where the
 10 court has indulged defense counsel over such a protracted
 11 period with respect to those preliminary determinations. And
 12 we think that you have ample in this record to make a
 13 determination that \$24 million is a respectable amount that
 14 people ought to be given an opportunity to determine whether
 15 they do or don't want to go through with that settlement.
 16 And that is all that this settlement does. It sets up a
 17 hearing date. And also it does another thing, which defense
 18 counsel has succeeded in deferring. It sends out a notice
 19 to the class that a class has been certified. And it does
 20 the two together as all of the judges are now doing the two
 21 together. Nothing more for you to determine. And to
 22 suggest at this late hour that you should set another hearing
 23 to determine whether you should send out this notice, I think
 24 it's asking for a little too much and taxing the court's
 25 patience too much.

1 MR. RAVEN: Well, Your Honor, in that respect,
 2 what we will do, we can speak to it in our paper that we are
 3 going to file. But it is addressed in this.

4 THE COURT: And we will talk about it next
 5 Monday.

6 MR. RAVEN: Good.

7 MR. FERGUSON: May I say one thing. And
 8 between now and next Monday, Your Honor, we will have an
 9 opportunity to study those settlement agreements, to study
 10 the information that you had before you at the time you
 11 determined the classes and make any preliminary determinations
 12 necessary.

13 THE COURT: Now, I have had no time to read,
 14 of course, those settlement agreements. I will undertake
 15 to do it, but I want to make this comment: that if the
 16 settlement papers do not contain the basis upon which the
 17 settlement amounts were determined, that must be added by
 18 the affidavit of the accountants who, I assume, are the
 19 experts who have advised plaintiffs on the subject of what
 20 would appear to be reasonable sums in light of all the
 21 circumstances.

22 MR. FERGUSON: Do you want that for the
 23 hearing on Monday?

24 THE COURT: I would like it if you have it
 25 available by that time. But it certainly would be available

1 before the date on which the hearing is held.

2 MR. FERGUSON: We'll be contemplated, Your
3 Honor, in connection with the date on the hearing for the
4 hearing of reasonableness and adequacy, we have contemplated
5 giving you all of the economic data necessary to justify
6 the settlements. And we feel that is the time we will give
7 it to you, probably by live testimony. That, in my opinion,
8 is the time this matter should be determined, a preliminary
9 determination to send out the notices I think is adequately
10 supported for your examination of this settlement agreement.

11 THE COURT: Next Monday we will fix the
12 date for that hearing. And I would want it to be a written
13 submission summarizing the basis on which the computation
14 was reached. And I think it should be distributed to those
15 who are opposing prior to the hearing date, so that they may
16 have an opportunity to examine the material, and if they
17 desire, appear and oppose.

18 MR. FERGUSON: We could do that, Your
19 Honor.

20 MR. LIGHT: Could it also be distributed to
21 me, Richard Light? I was on the executive committee at the
22 time the settlements were negotiated.

23 MR. FERGUSON: We take the position that
24 non-settling plaintiffs have no business, people who were
25 excluded in a settlement and opted out have no business

1 coming to a hearing on settlement.

2 THE COURT: I am not going to make any
3 determination at this time of who may appear or participate.
4 I am only providing that data should be distributed to all
5 those who may want to oppose. But I don't guarantee that
6 they will be given an opportunity to oppose unless they
7 want to write something in writing.

8 MR. RAVEN: Your Honor, I am not sure that
9 one of our objections has been clearly stated for Your
10 Honor's benefit for the record insofar as the contents of
11 the notice is concerned. And there has been some misunder-
12 standing in the papers. That is why I rise to attempt to
13 clarify it. I think there has been some suggestion in the
14 plaintiffs papers -- and maybe I misread them -- that we
15 were as a matter of principle objecting to the combining of
16 a 23(C)(2) notice and an E notice, litigating class and
17 the settlement papers.

18 We wish to make it clear that we are not
19 taking any position like that without reference to other
20 facts. What we do object to, our objection is much more
21 refined than that. Our objection is that it is improper in
22 a case like this to send them out together if the proper
23 procedure is not followed with respect to examination of the
24 settlement, and we rely on the Manual for that, we want to
25 be sure that that is open to us. And we will talk further in

1 our papers that we are going to file. But I want to raise
 2 it so Your Honor understood we were not just taking a flat
 3 position. We think downstream there would come a time when
 4 combined notice could go out. We think, not at this time --
 5 I didn't want Your Honor to understand that. It isn't just
 6 a flat position. It is much more refined than that. It
 7 depends upon the circumstances of that case.

8 MR. KOHN: I don't want to argue the point,
 9 but just to make opposition clear on the record, it was my
 10 understanding that the non-settling defendants had receded
 11 from that refined position. And we are simply talking about
 12 what was to go into the notice in the form of order. That
 13 was the end of that particular problem about whether you can
 14 send out notice of settlement with the notice of -- we have
 15 given all the authorities. We thought that they would be
 16 persuaded. And, of course, it is what every judge is doing
 17 now who has exactly the same problem before him. So we
 18 wanted to make that clear, that we thought we had settled
 19 that. But I suppose we can't stop them from putting some-
 20 thing on a piece of paper.

21 MR. RAVEN: We will do that in our paper,
 22 too, Your Honor.

23 THE COURT: I am sure you will, in whatever
 24 form you think is appropriate and proper for the occasion.
 25 I don't undertake to limit you in that respect.

1 MR. KOHN: I take it, then, sir, as far as
 2 the form of notice is concerned, the only missing element,
 3 once again, is the series of dates, and you will insert
 4 those on Monday. Everything else as to the form of notice
 5 is agreed.

6 Now, if we could consult with counsel
 7 respecting the order which deals with how, after the form
 8 is put into effect, you distribute it, perhaps we can come
 9 back to you with some resolution of that very promptly. As
 10 I said before, I think it is largely a misunderstanding as
 11 to what counsel think we are trying -- that is, what defense
 12 counsel think plaintiff counsel are trying to arrogate unto
 13 themselves by way of authority. I think it is precisely
 14 nothing. I think we can explain that and come back to you.

15 THE COURT: You should make an effort at
 16 it today.

17 MR. KOHN: I will be happy to do it right
 18 away.

19 THE COURT: I will recess. If and when you
 20 reach a conclusion or stalemate or whatever, call me and I
 21 will come back out.

22 MR. RAVEN: Your Honor, in fairness to Your
 23 Honor, I wouldn't want Your Honor misled. As Your Honor
 24 knows, we got that last night at 4:00. We have general
 25 counsel to consult. We have to consult among ourselves. We

1 do want to meet with Mr. Kohn and others. I want to ask
 2 him some questions about it. I think we can resolve some
 3 problems, but I don't believe, Your Honor, that we will be
 4 able to resolve this matter that was presented to us last
 5 night at 4:00 of monumental importance today. And I think
 6 we will want to take our opportunity to file a brief with
 7 Your Honor, and Your Honor --

8 THE COURT: All I understood was that you
 9 were going to think about the dates that we need.

10 MR. KOHN: As far as -- I want to give you
 11 some dates as was suggested on the record before. What I
 12 would like to do with Mr. Raven and the other people --

13 THE COURT: I would like you to take it up
 14 informally together.

15 MR. KOHN: See if we can narrow the issues
 16 for Monday.

17 MR. RAVEN: I wouldn't want Your Honor to
 18 miss any planes on the thought that we would do it.

19 THE COURT: I am not trying for any planes.

20 MR. RAVEN: All right, Your Honor.

21 MR. COCHRAN: We have some input we want to
 22 put in the record. John Cochran for the A.G. plaintiffs.

23 THE COURT: I am not in any hurry for
 24 anything. It doesn't bother me in the slightest.

25 MR. RAVEN: I just wanted Your Honor to

1 understand.

2 THE COURT: It is kind and considerate of
 3 you. It is not bothering me. I would rather have you
 4 discuss shortening those dates.

5 MR. FERGUSON: I would like to speak on that
 6 subject.

7 THE COURT: I don't mind telling you why.
 8 It is basically because I am anxious to get on with this.
 9 And secondly, if you can shorten those dates just slightly,
 10 not too any great extent, I think we can hold that hearing
 11 before I depart for the east.

12 MR. FERGUSON: Well, that is not possible,
 13 Your Honor. But it is possible to get all of the paperwork
 14 out of the way before you leave for the east. And along
 15 that line, I am going to make some suggestions about
 16 changing some dates in the order you signed yesterday and
 17 the proposed order you are going to consider on Monday. I
 18 am going to give you these dates now and tell you where
 19 they are in the respective orders. I wish everybody,
 20 plaintiffs and defendants, would consider it. And I would
 21 like to bring it up for next Monday when, in Tacoma, when
 22 you have this hearing.

23 THE COURT: All right.

24 MR. FERGUSON: The dates I am speaking of --
 25 I don't have this written down, so would everybody take it

1 and I will give you line and page. I'm going to speak first
 2 of the order entered yesterday, which was the order modify-
 3 ing class action order dated May 20, 1976. I am looking at
 4 page 6 of that order, on line 7, and at that point it is
 5 paragraph B. I would like to delete "30" and change it to
 6 "10", changing 30 days to 10 days. This deals with the
 7 plaintiffs getting class representatives and attorneys in
 8 order. And I haven't spoken to all the plaintiffs about
 9 this, and there may be some objections. So I am making
 10 these suggestions now so that they may be heard next Monday.
 11 And if anybody, plaintiffs or defendants, has any objections
 12 we can hear them. I would also suggest that the word "entry"
 13 be changed to "modification", which is going to mean that
 14 there will, in effect, be 17 days notice instead of 30
 15 because this would not go into effect until next Monday.
 16 And then there would be 10 days from Monday. So this would
 17 change 30 to 17.

18 Then on that same page, that same order,
 19 going down to line 20, I am suggesting a change of 10 to 5.
 20 And on line 27 of the same page, I am suggesting again a
 21 10 to 5. Now, that requires an order from Your Honor. This
 22 would hopefully get that order signed before Your Honor left
 23 for the east. And that is what we are trying to accomplish.
 24 The dates for the hearing, the dates for the opt outs would
 25 also be determined next Monday. And they, of course, would

1 try to get in the pattern of having the hearing shortly
 2 after Your Honor got back. So this is the kind of thing
 3 that we are trying to do.

4 Now, there is one other order in which we
 5 propose to change the dates. The order which we proposed to
 6 be handed to you this morning, we proposed to enter next
 7 Monday, which is an order called "Pre-trial Order Re: Form
 8 of Notice," on page 3, on line 15, we propose to change the
 9 15 days to 10 days. And on the same page, line 31, we
 10 propose to change the 10 days to 5 days. And this is
 11 consistent with what Your Honor has expressed in connection
 12 with shortening. We believe, I believe, and the rest of
 13 the members of the steering committee believe that this is
 14 proper. If anybody, plaintiff or defendant, feels we are
 15 shortening this time too much, we can certainly take it up
 16 next Monday. But I wanted to give you all the benefit of
 17 that thinking, and we will see where we go next Monday.

18 THE COURT: Are there any other matters
 19 now?

20 MR. VIZAS: Robert Vizaz. I know you spoke
 21 to Mr. Jeffers yesterday, and as he told you, he had to go
 22 back to Houston, but yesterday you indicated that you hadn't
 23 decided whether you are going to rule on the Imperial Motion
 24 at this time. I just wanted to inquire as to whether you
 25 decided to defer ruling on that or rule at this time.

1 THE COURT: I have deferred it, and I think
2 I will defer it until at least next Monday.

3 MR. VIZAS: All right, at least one further
4 understanding, then. I haven't been privy to the meetings
5 between defendants counsel and plaintiffs for various
6 reasons. But I am informed that the reference to Imperial
7 in the proposed notices has been eliminated.

8 MR. KOHN: That is correct.

9 MR. VIZAS: That will satisfy us, thank you.

10 THE COURT: I wish also to advise you that
11 our next regular pre-trial conference will be on Monday,
12 November 22. That would be the earliest time after I return
13 from my Boston assignment because I have a trial that will
14 be started, unless it is somehow or other terminated, just
15 a few days after I get back from Boston. And the next
16 earliest date would be the 22nd of November, 1976. Now,
17 this, of course, is far in advance and could be subject to
18 modification. But I want all of you to be aware of that
19 date and keep it in mind, make it a two day affair just as
20 we have this one, hopefully not to use the two days but
21 leave them available if we need them.

22 MR. KOHN: While we are all here, as far as
23 Mr. Cooper and other people at our table, that perhaps we
24 could look toward making that the hearing date.

25 THE COURT: What?

1 MR. KOHN: The hearing date with respect
2 to the approval of the settlement. So people will have that
3 date in mind if they have any reservations about it. They
4 can let Your Honor know about it if that is the first date
5 you will be back.

6 MR. FERGUSON: We will take that up on
7 Monday.

8 THE COURT: We will take that up on Monday.
9 But that date I want all of you to save, the 22nd and 23rd
10 of November because if we are all healthy and well we will
11 assemble at that time subject to developments between now
12 and then to make it inadvisable or whatever.

13 Now, is there anything that you would wish
14 me to stand by for today?

15 MR. RAVEN: I don't believe so, Your Honor.

16 THE COURT: You could have an informal
17 meeting, first, and I will go out. If you think of some-
18 thing else between you that you want me to clarify, I would
19 be glad to do it.

20 MR. RAVEN: Thank you, Your Honor.

21
22 (THE HEARING WAS ADJOURNED.)
23
24
25

1 C E R T I F I C A T E

2
3 I, Elinor A. Holloway, Official Reporter of
4 the United States District Court at Tacoma, Washington, do
5 hereby certify:
6

7
8 That the foregoing transcript is a true, full and
9 correct transcript of my shorthand notes taken as such Official
10 Reporter of the proceedings hereinbefore entitled and
11 reduced to typewriting to the best of my ability.
12

13 Dated this _____ day of August, 1 976.
14
15
16

17
18 _____
19 ELINOR A. HOLLOWAY
20
21
22
23
24
25

JUL 29 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977.

No. 77-4.

IN RE SUGAR ANTITRUST LITIGATION
(MDL NO. 201).

**The Amalgamated Sugar Company, Amstar Corporation, California
Beet Growers Association, Ltd., The Great Western Sugar
Company, and U and I Incorporated,**

Petitioners,

v.

**United States District Court for the Northern District
of California,**

Respondent.

**Anthony J. Pizza Food Products Corporation, et al.,
(Civil No. C75-1123, et al.)**

Real Parties in Interest.

**BRIEF ON BEHALF OF REAL PARTIES IN
INTEREST IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT.**

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INDEX.

	Page
PROCEEDINGS BELOW	2
I. Proceedings in the District Court	2
II. Proceedings in the Court of Appeals	2
PROCEEDINGS IN THIS COURT	3
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
I. Nature of the Case	5
II. Allegations Set Forth in the Petition for Certiorari ..	7
SUMMARY OF REASONS FOR DENYING THE WRIT	14
REASONS FOR DENYING THE WRIT	15
1. The Decision of the Ninth Circuit Is in Accord With the Decisions of This Court and Is Consistent With the Decisions of the Courts of Appeal	15
2. The Decision of the District Judge Is a Correct Appli- cation of Statutory and Case Law and Does Not Conflict With the Decision of This Court or the Courts of Appeal	18
(a) Duty to Sit	18
(b) Petitioners Are Unable to Show Bias, Prej- udice, Partiality or Impropriety	20
(c) Petitioners' Motion to Disqualify the Dis- trict Judge Was Not Timely Filed	22
CONCLUSION	23
CERTIFICATE OF SERVICE	24

INDEX (Continued).

APPENDIX:	Page
Court of Appeals Order, January 28, 1977	A1
Court of Appeals Order, June 6, 1977	A2
Court of Appeals Memorandum Order, June 7, 1977	A4
Court of Appeals Order, June 27, 1977	A9
Order of the Judicial Panel on Multidistrict Litigation Assigning Transferee Judge, October 6, 1976	A10
District Court Opinion and Order Re Class Actions, July 6, 1977	A11
District Court Order Re Defendants' Motion for Extension of Time and Additional Discovery, October 7, 1975	A28
District Court Order Re Plaintiffs' Motion to Dismiss Defendants' Counterclaims, March 4, 1976	A30
Notice to Purchasers of Refined Sugar of Class Action Determination and Proposed Partial Settlement	A32
District Court Order Re Defendant National Sugarbeet Growers Federation's (NSGF) Motion to Dismiss for Lack of Jurisdiction and Proper Venue, March 4, 1976	A48
District Court Order Re Defendants' Motion to Dismiss for Failure to Answer or Timely Answer Defendants' Class Action Interrogatories, March 4, 1976	A50

TABLE OF CITATIONS.

Cases:	Page
Berger v. United States, 255 U. S. 22 (1921)	15
Brotherhood of Loc. Fire and Eng. v. Bangor and Aroostock R. Company, 380 F. 2d 570 (D. C. App. 1967), <i>cert.</i> <i>denied</i> , 389 U. S. 970 (1968)	22
Chessman v. Teets, 239 F. 2d 205 (9th Cir.), <i>rev'd on other</i> <i>grounds</i> , 354 U. S. 156 (1956)	22
Curry v. Jensen, 523 F. 2d 387 (9th Cir.), <i>cert. denied</i> , 423 U. S. 998 (1975)	17
Davis v. Cities Service Oil Co., 420 F. 2d 1278 (10th Cir. 1970)	21
Folding Carton Antitrust Litigation (MDL 250)	9
Hall v. Burkett, 391 F. Supp. 237 (W. D. Okla. 1975)	22
In Re Sugar Industry Antitrust Litigation (MDL 201), 1977-1 CCH Trade Cases ¶ 61,373 (N. D. Cal. 1976)	2, 11
In Re Sugar Antitrust Litigation, MDL 201, 395 F. Supp. 1271 (J. P. M. L. 1975)	5
In Re: Union Leader Corporation, 292 F. 2d 381 (1st Cir. 1961)	20
Knoll v. Socony Mobil Oil Co., 369 F. 2d 425 (10th Cir. 1966)	22
Laird v. Tatum, 409 U. S. 824 (1972)	16
Parrish v. Board of Com'rs. of Alabama State Bar, 524 F. 2d 98 (5th Cir. 1975) (<i>en banc</i>), <i>cert. denied</i> 425 U. S. 944 (1976)	16, 17
Peckham v. Ronrico Corp., 288 F. 2d 841 (1st Cir. 1961)	22
Samuel v. University of Pittsburgh, 395 F. Supp. 1275 (W. D. Pa. 1975), <i>rev'd on other grounds</i> , 538 F. 2d 991 (3d Cir. 1976)	20
United States v. Bray, 546 F. 2d 851 (10th Cir. 1976)	19, 21
United States v. De La Fuente, 548 F. 2d 528 (5th Cir. 1977)	22
United States v. Goeltz, 513 F. 2d 193 (10th Cir.), <i>cert.</i> <i>denied</i> , 423 U. S. 843 (1975)	19
United States v. Grinnel Corp., 384 U. S. 563 (1966)	21
United States v. Hurd, 549 F. 2d 118 (9th Cir. 1977)	22

TABLE OF CITATIONS (Continued).

Cases (Continued):	Page
United States v. Mitchell, 377 F. Supp. 1312 (D. D. C., 1974), <i>petition for mandamus denied</i> , 502 F. 2d 375, <i>cert.</i> <i>denied</i> , 418 U. S. 955 (1974)	20
United States v. Montecalvo, 545 F. 2d 684 (9th Cir. 1976)	21
United States v. Ritter, 540 F. 2d 459 (10th Cir.), <i>cert. denied</i> , — U. S. —, 97 S. Ct. 370 (1976)	16, 17
United States v. Thompson, 483 F. 2d 527 (3rd Cir. 1973) ..	21
Ward v. Village of Monroeville, 409 U. S. 57 (1972)	21
 United States Code:	
15 U. S. C. Section 1	5
15 U. S. C. Section 4	5
15 U. S. C. Section 16	5
28 U. S. C. Section 144	1, 2, 4, 20, 22
28 U. S. C. Section 455	1, 2, 4, 17, 19, 20
28 U. S. C. Section 1254(1)	3
28 U. S. C. Section 1291	2
28 U. S. C. Section 1292(b)	2
28 U. S. C. Section 1407	8
28 U. S. C. Section 1651	1
 Miscellaneous:	
Fed. R. Civ. P. No. 16	9
Manual For Complex Litigation § 1.92 (1973)	8
S. Rep. No. 93-419, 93rd Cong., 1st Sess., 1973, p. 5	18
13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3549	18

BRIEF ON BEHALF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondents, the Real Parties in Interest herein, oppose the Petition for Writ of Ceriorari. This Petition seeks review of the denial by the Court of Appeals for the Ninth Circuit of a petition for a writ of mandamus, under 28 U. S. C. Section 1651, to review an order of the district judge refusing to disqualify himself under 28 U. S. C. Sections 144 and 455(a).

PROCEEDINGS BELOW.**I. Proceedings in the District Court.**

On May 20, 1976, the district court certified certain actions to proceed as class actions. *In Re Sugar Industry Antitrust Litigation* (MDL 201), 1977-1 CCH Trade Cases ¶ 61,373 (N. D. Cal. 1976). Several, but not all, defendants requested the district court to certify an interlocutory appeal of its class certification order pursuant to Title 28 U. S. C. Section 1292(b). After extensive briefing the district court denied defendants' request.

On October 8, 1976, certain defendants filed a motion requesting that the district judge disqualify himself, under 28 U. S. C. Sections 144 and 455 (Petitioners' Appendix C, p. 1). On December 6, 1976, Judge Boldt denied the motion (Petitioners' Appendix B, p. 10a).

II. Proceedings in the Court of Appeals.

Certain defendants, petitioners herein, filed (a) an appeal from the class certification order of the district judge, under Title 28 U. S. C. Section 1291, and (b) a petition for a writ of mandamus ordering the district judge to vacate his order certifying the classes. The Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction on January 28, 1977 (Appendix, p. A1), denied a petition for rehearing on June 6, 1977 (Appendix, p. A2) and denied the petition for writ of mandamus on June 7, 1977 (Memorandum Order, Appendix, p. A4), as well as various motions for stay orders. Petitioners requested an extension of time to petition for rehearing which was granted on June 27, 1977 (Appendix, p. A9).

On January 17, 1977, petitioners also filed a petition for writ of mandamus in the Court of Appeals for the Ninth Circuit seeking review of the district judge's order refusing to disqualify himself, which petition was denied on February 21, 1977 (Petitioners' Appendix B, p. 9a.)

PROCEEDINGS IN THIS COURT.

After requesting and being granted an extension of time within which to file a petition for a writ of certiorari, on June 30, 1977 petitioners filed their petition for a writ of certiorari pursuant to 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals correctly apply established legal precepts in denying a petition for a writ of mandamus to review the district judge's order refusing to disqualify himself under 28 U. S. C. Section 144 where:

(a) The district judge showed no personal bias or prejudice against or in favor of any party.

(b) The affidavits submitted by petitioners were based on hearsay and conjecture, and were legally insufficient to require disqualification of a district judge;

(c) The affidavits were not timely filed, and were barred by the applicable statutory provision and laches?

2. Did the Court of Appeals correctly apply established legal principles in denying a petition for a writ of mandamus to review the order of the district judge refusing to disqualify himself, under 28 U. S. C. Sections 144 and 455, where the Judge, applying the correct legal standard, after considering all of the memoranda and affidavits submitted to him, determined that his impartiality was not being reasonably questioned?

3. Did the Court of Appeals correctly apply established legal principles in denying a petition for a writ of mandamus seeking review of the order of the district judge refusing to disqualify himself, where petitioners' arguments were based entirely on their own attacks on the trial court judge, and there was nothing in the record to substantiate the charges?

STATEMENT OF THE CASE.

I. Nature of the Case.

These consolidated proceedings have been brought by private business entities and governmental entities against sugar processors and two trade associations, five of whom are petitioners herein, for violations of the federal antitrust laws. The actions were filed subsequent to two federal criminal indictments and three accompanying federal civil complaints against various defendants. On July 2, 1975, the Judicial Panel on Multidistrict Litigation transferred many of these actions to the Northern District of California before the Honorable George H. Boldt, a Senior Judge for the Western District of Washington, sitting by special designation. *In Re Sugar Industry Antitrust Litigation*, 395 F. Supp. 1271 (J. P. M. L. 1975) (MDL 201). Additional actions have been filed in or transferred to the Northern District of California and assigned to Judge Boldt.

The Complaints allege that defendants conspired to, and did, fix the prices of refined sugar and molasses and allocated customers and territories, causing plaintiffs to pay higher prices for sugar than they would have paid absent the conspiracy, in violation of Section 1 of the Sherman Act, 15 U. S. C. Section 1. The plaintiffs seek damages and injunctive relief under 15 U. S. C. Sections 4, 16.

This matter has been before the Court of Appeals at the behest of defendants on at least three equally frivolous occasions. No question or conflict exists to be resolved by the Court. The questions presented in support of the Petition are totally without merit.

Question No. 2 reads: "Is mandamus the appropriate remedy to review an order of a district judge refusing to

disqualify himself when sufficient grounds have been presented by the moving parties?" However, that is not an issue in these proceedings. The Court below did not dismiss the Writ upon the ground that mandamus was not the appropriate remedy, as a comparison of the language in the Orders in those three proceedings clearly demonstrates. The inclusion in the Petition of Question No. 2 is simply an attempt to bolster a Petition which has no merit.

In the proceedings in the Court of Appeals for the Ninth Circuit, No. 76-3303, "*In Re: Sugar Antitrust Litigation*, MDL No. 201, *Baldi Candy Company, et al.*, Plaintiffs-Appellees v. *The Amalgamated Sugar Company, et al.*, Defendants-Appellants," the Court disposed of an appeal under 18 U. S. C. § 1291 from the class determination for lack of jurisdiction, specifically stating: "Upon due consideration of the motion to dismiss, the appeal is dismissed for lack of jurisdiction. *Blackie v. Barrach*, 524 F. 2d 891 (9th Cir. 1975)." (Emphasis added). (Appendix, p. A1).

Defendants filed a Petition for Rehearing. The Ninth Circuit, in an Order filed June 6, 1977, rejected defendants argument that it was thereby adopting a "per se rule of non-appealability of class certification orders" and discussed the appealability decisions of other circuits. (Emphasis added). (Appendix, p. A2).

On the other hand, in No. 76-2919, a mandamus to set aside the district court's class determinations "*In Re Sugar Antitrust Litigation*, MLD No. 201, *American Crystal Sugar Co., et al.*, Petitioners v. *U. S. District Court For The Northern District of California*, Respondent, *Anthony J. Pizza Food Products Corp., et al.*, Real Parties In Interest," the Court of Appeals made no statement with respect to the propriety of mandamus, but did deny the Petition

on the merits because the district court had not abused its discretion. (Appendix, p. A4).

Here, in No. 77-1144, *In Re Sugar Antitrust Litigation*, MDL No. 201, *The Amalgamated Sugar Company, et al.*, Petitioners v. *United States District Court For The Northern District Of California*, Respondent, *Anthony J. Pizza Food Products Corp., et al.*, Real Parties In Interest, the Court of Appeals stated: "Upon due consideration, the petition for writ of mandamus is denied." The Court did not mention lack of jurisdiction or any other procedural impediment. (Petitioners' Appendix B, p. 9a).

Turning next to the only other question posed by Petitioners, in support of the petition, which is in two parts, the district court did not apply an erroneous legal standard, and the standard it applied in no way is inconsistent with the standard applied by the Court of Appeals or this Court. The district court simply decided, applying those standards, as set forth more fully herein, that there was no reasonable ground, even assuming the allegations by defendants to be true, upon which its impartiality might reasonably be questioned. (Memorandum Decision re: Disqualification, Petitioners' Appendix B, p. 10a). The Court of Appeals agreed.

II. Allegations Set Forth in the Petition for Certiorari.

Petitioners' contention that Judge Boldt's alleged friendship with William H. Ferguson, one of more than fifty counsel for plaintiffs, and Chairman of the 19 man Plaintiffs' Steering Committee, requires disqualification is totally without merit. They are not former partners or relatives, and there is no allegation whatsoever of any "close personal" relationship of any kind between Mr. Ferguson and Judge Boldt, other than that they practiced as opponents at the same bar prior to Judge Boldt's appointment to the Federal Bench, and are friends.

Petitioners extended effort to suggest judicial bias by alleging that Mr. Ferguson had originally opposed consolidation of the 1812 case pursuant to 28 U. S. C. Section 1407, and later consented to it is inconsequential. Mr. Ferguson's decision with regard to consolidation was reached after weighing all of the relevant considerations. The 1812 case had been pending approximately two years prior to consolidation. Consolidation provided the opportunity for a joint effort with a large number of additional experienced antitrust counsel.

Petitioners' contention that Judge Boldt "appointed" Mr. Ferguson the Chairman of the Plaintiffs' Steering Committee is both incorrect and immaterial. Mr. Ferguson stated on the record at the outset of the first pretrial hearing conducted by the district court that he was acting as Chairman of the plaintiffs' group (Petitioners' Appendix C, p. 623). Judge Boldt acknowledged on the record, that day, that Mr. Ferguson was acting as Chairman (Petitioners' Appendix C, p. 719). He made it clear on the record that he had not appointed any executive committees, steering committees or leaders, acknowledging that, while he had the authority to do it, it was his practice to allow counsel involved to select their own leaders. The district court only approved what counsel had agreed upon (Petitioners' Appendix C, p. 914). Of course, even if Judge Boldt had appointed a Chairman of the Plaintiffs' Steering Committee, such appointment would not serve as any ground for disqualification. In fact, the *Manual For Complex Litigation* § 1.92 (1973), permits the district court to make such appointments, and many Judges do so, some confirming the selection by all counsel, and others making their own designation.

The assertion that the district court was informed of certain settlements between the plaintiffs and some defendants, and that such information constitutes a ground

for disqualification, is similarly immaterial and incorrect. Defendants have not indicated any authority which would support a restriction on communications with respect to settlement to a judge before whom litigation is pending or require that a judge thus informed be disqualified. Indeed, many judges insist upon participating in settlement negotiations while continuing to supervise the litigation against the same or other parties. For example, in the *Folding Carton Antitrust Litigation* (MDL 250), certain defendants requested that one judge be assigned as a trial judge, and another judge be assigned as "settlement judge". The Judicial Panel on Multidistrict Litigation rejected this suggestion and assigned both judges to supervise *all* aspects of the pending litigation in that complex antitrust case (Appendix, p. 10). Fed. R. Civ. P. No. 16 for many years listed settlement negotiations as a subject to be considered at pretrial conference.

There is not one statement or assertion to the effect that Judge Boldt ever read the settlement agreements prior to the determination of the class motions. To the contrary, the record is replete with statements indicating that the district court meticulously avoided reading the terms of the proposed settlements with certain defendants until after his order on class motions had been entered, reconsidered and affirmed.

At the close of the hearing on December 9, 1975, to which Petitioners refer, the district judge stated that he wanted to get the views of the parties concerning what, if anything, he should do with respect to the proposed settlements that had been mentioned to him (Petitioners' Appendix C, p. 886). The following day, in open court, the district judge sought to relieve the minds of all the parties concerning any possible impropriety that might exist because of the delivery to him of a document which

contained a copy of the proposed settlement. Judge Boldt stated, on the record, that the chief counsel for Amstar knew first hand that the judge had only received such document that prior morning, and had had no time to read it except to scan the title prior to being asked by defendants not to consider the proposed settlement before ruling on the class issue. The district judge then stated that the documents remained the way that he had received them, and that he was not going to look at them again until an appropriate time came when all could agree that it would be proper for him to do so. Defendants did not contest these facts at the December 9-10, 1975 pretrial hearing. Judge Boldt further assured the parties that no settlement would be considered until after the ruling on class motions (Petitioners' Appendix C, p. 895-896). In fact, the district court was unaware of the specific provisions of the settlement until counsel for the defendants chose to inform him of certain provisions during argument (Petitioners' Appendix C, p. 906). As a final assurance to the parties concerning possible prejudice from the consideration of any proposed settlement, the district judge informed the parties that he would not accept any information about the settlements until presented by both sides, pursuant to the customary practice to put in motion the Fed. R. Civ. P. 23 procedures for approval of class settlement (Petitioners' Appendix C, p. 922).

Plaintiffs' Coordinating Counsel filed with the Clerk of the District Court on December 5, 1975 the original Holly Settlement Agreement, which was attached to the Request for Establishment of a Schedule for Consideration of the Proposed Settlement. That document was filed prior to the Pretrial Conference on December 9-10, 1975, before the non-settling defendants had voiced any objection to the district court's receiving a copy of the proposed settlement agreement, and prior to transmittal to that court. Accord-

ingly, it was not actually literally filed under "seal" with the Clerk. However, Judge Boldt stated informally in chambers on December 9, 1975, and on the record of December 10, 1975, that he had not read the contents of the Settlement Agreement (Petitioners' Appendix C, pp. 895-896). Nowhere is it suggested that the district judge ever did otherwise but abide by his statement. The fact that actual filing of the settlement with the Clerk was not under a technically defined seal is immaterial. The district court's use of the word "seal" at the *Fertilizer* hearing is insignificant and irrelevant since whether the Agreement was under "seal" at the Clerk's office is immaterial, even by defendants' reckoning, as long as it was not read by the district court.

Petitioners further argue that Judge Boldt must have read the *Holly* settlement papers because he certified classes along the lines of those contemplated in the settlement papers. This reasoning falters, however, since the classes established vary from those contemplated in the *Holly* agreement in material respects: i.e., the district court granted state governmental entity classes only in those instances where the state had brought an action in its own name, whereas the settlement contemplated that the named state plaintiffs would act as representative parties for the public entities in other states which had not brought actions. The district court modified the contemplated class of retail grocery stores by not establishing a level of minimum purchases such as was anticipated in the *Holly* papers. The principal class not certified, indirect consumer purchases, was vigorously opposed by defendants themselves. *In Re Sugar Antitrust Litigation, supra*.

Finally, when certain plaintiffs requested the district court to certify classes of Eastern purchasers who bought from Western defendants, defendants adamantly opposed

the request, and on July 6, 1977, Judge Boldt refused to certify the proposed classes (Opinion and Order Re Class Actions, Appendix, p. A11).

Petitioners allegations of prejudice are based on a series of *ex parte* communications, all of which were known and acknowledged by defendants before they made two informal oral requests that Judge Boldt recuse himself, months before they filed their original Motion to Disqualify.

Defendants specifically stated they intended to and, in fact, did request Judge Boldt to withdraw from presiding over litigation matters in these proceedings at a December 22, 1975 meeting. Yet, at that meeting, defendants did not indicate that they believed any of the contacts Mr. Ferguson had with the Court were either improper or a basis for disqualification. At that meeting, and again at the September 23, 1976 Pretrial Conference in Boston, defendants limited their complaints to the district court's receipt of the unread Holly Agreement and the "skimmed" Freeman letter which counsel for *defendants* made part of the record.

In fact, it appears that defendants hoped to intimidate the district court with threats of disqualification while issue after issue was being put before it for decision. When intimidation had run its course and failed, the Motion to Disqualify was actually filed, ten months late.

Each of Judge Boldt's rulings in this litigation has been founded on sound legal principles and precedent. There is absolutely no reasonable support for allegations of prejudice against defendants. At the onset of the class action briefing schedule, defendants were granted an initial four-week extension of time in which to conduct class action discovery by interrogatories and depositions as a requested prerequisite to their first memoranda in opposi-

tion to plaintiffs' class action motions (Order Re Defendants' Motion For Extension Of Time And Additional Discovery, Appendix, p. A28), and an additional two-week extension thereafter. Later they requested and received a 30-day extension to prepare an economic report.

Furthermore, six defendants alleged a myriad of counterclaims against both plaintiffs and unidentified class members. Following extensive briefing, which included the submission of supplemental memoranda after oral argument at the December 9-10, 1975 pretrial conference, Judge Boldt refused "to strike any of defendants' counterclaims on the basis of the argument of counsel rather than upon facts developed in discovery" (Order Re Plaintiffs' Motion to Dismiss Defendants' Counterclaims, Appendix, p. A30). Plaintiffs were obliged to answer all counterclaims and to include a sentence in the proposed Notices to class members informing members of the industrial user, retail grocer, wholesaler and agricultural molasses user classes that defendants have filed various counterclaims against certain plaintiffs and class members (Notice to Purchasers of Refined Sugar of Class Action Determination and Proposed Partial Settlement, Appendix, p. A32).

The district court ruled in favor of defendant National Sugarbeet Growers Federation's motion to dismiss for lack of jurisdiction and proper venue (Order Re Defendant National Sugarbeet Growers Federation's (NSGF) Motion To Dismiss for Lack of Jurisdiction and Proper Venue, Appendix, p. A48), and imposed sanctions against certain plaintiffs who did not comply with defendants' discovery requests (Order Re Defendants' Motion to Dismiss for Failure to Answer or Timely Answer Defendants' Class Action Interrogatories, Appendix, p. A50).

SUMMARY OF REASONS FOR DENYING THE WRIT.

The writ should be denied because:

1. The decision of the Ninth Circuit is in accord with the decisions of this Court and the decisions of other Courts of Appeal.

2. The decision of the district judge is a correct application of statutory and case law and does not conflict with the decisions of this Court or of other Courts of Appeal.

REASONS FOR DENYING THE WRIT.

1. The Decision of the Ninth Circuit Is in Accord With the Decisions of This Court and the Decisions of the Other Courts of Appeal.

There is no conflict either among the circuits or with any decision of this Court in the cases cited by Petitioners.

Judge Boldt, as the Court stated in *Berger v. United States*, 255 U. S. 22, 36 (1921), "had a lawful right to pass upon the sufficiency of the affidavit" and followed the proper standard, namely, accepting the allegations as true, whether they were legally sufficient to require disqualification, and whether it reasonably appeared that he was prejudiced, biased, or likely to be partial.

In the *Berger* case, a criminal case under the World War I Espionage Act against German defendants, Judge Landis had stated:

"One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States, and have the interests of the enemy at heart by defending that things they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such; and now, when this country is at war with

Germany, you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower."

That in no way resembles the facts averred in the Petition here.

Petitioners have attempted to create a straw man conflict between the 5th and 10th Circuits (but apparently not the 9th Circuit) in an effort to bring before your Honorable Court what is essentially dissatisfaction with the rulings of an experienced and eminently fair trial judge.

The fact that in *Parrish v. Board of Com'rs. of Alabama State Bar*, 524 F. 2d 98 (5th Cir. 1975), *cert. denied*, 425 U. S. 944 (1976), the Court found that the litigant's concern was not reasonable and that in *United States v. Ritter*, 540 F. 2d 459 (10th Cir.), *cert. denied*, — U. S. —, 97 S. Ct. 370 (1976), it found that the concern was reasonable, does not mean that different tests were followed, but simply that the fact situations were different and, therefore, required different answers.

In the *Parrish* case, as in the model opinion by Justice Rehnquist in *Laird v. Tatum*, 409 U. S. 824 (1972), the Court examined the allegations and, as Judge Boldt did, found them insufficient to satisfy the test of reasonable belief that the judge was biased or prejudiced.¹

1. The district judge did not write a lengthy Opinion setting forth all the relevant facts and law, nor did he have any obligation to do so. See *Laird v. Tatum*, 406 U. S. 824 (1972).

Petitioners have distorted the *Parrish* decision, in their attempt to obtain review by this Court. Both the *Parrish* and *Ritter* Courts stated that Section 455, as amended, demands an assessment of the reasonableness of a belief that partiality exists. Contrary to Petitioner's representations, the *Parrish* Court did not suggest that a litigant must demonstrate the existence of actual bias. The *Parrish* Court applied an objective test, based on what a reasonable man confronted with the facts of the particular case would reasonably believe. The *Ritter* Court, applying the same standard, stated that the question is "... whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists a *reasonable likelihood* that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court." 540 F. 2d at 464 (emphasis added).

Similarly, in *Curry v. Jensen*, 523 F. 2d 387, 388 (9th Cir.), *cert. denied*, 423 U. S. 998 (1975), the Court of Appeals for the Ninth Circuit stated:

"To be legally sufficient to require disqualification, the affidavit must state facts sufficient to convince a reasonable man that the judge possesses bias or prejudice in the matter. (citations omitted) The appellant stated no specific facts to support allegations of bias or prejudice that would meet this standard."

Judge Boldt applied the "reasonableness" standard, when he denied the Motion to Disqualify. The *Ritter* and *Parrish* decisions, the decisions of the Ninth Circuit as well as the decision of Judge Boldt, are in complete accord with one another, and with the amended statute and relevant case law. As the report of the Senate Judiciary Committee recommending adoption of the amended statute stated:

"At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. (Emphasis in original) Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice. S. Rep. No. 93-419, 93rd Cong., 1st Sess., 1973, p. 5, quoted in 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3549.

2. The Decision of the District Judge Is a Correct Application of Statutory and Case Law and Does Not Conflict With the Decision of This Court or of Other Courts of Appeal.

(a) Duty to Sit.

Petitioners' contention that the District Judge, in denying the Motion to Disqualify, relied on the "duty to sit" concept is totally without merit. As set forth above, Judge Boldt applied the reasonableness standard required by statutory and case law. In his Opinion, he stated: "Any person thinking or acting *reasonably* must reach his or her opinions and conclusions upon established *facts*, as distinguished from conjecture, suspicion, rumor or inferences drawn from other than established *facts*" (emphasis in original), and concluded that: "In my fully considered judgment, there is no *reasonable* basis either in fact or law

for my disqualification in this litigation (emphasis in original)." (Petitioners' Appendix B, page 13a).

Judge Boldt did observe that the litigation was and would be extensive and fraught with "numerous problems" and "difficult decisions" and, said that he would not avoid or abandon those problems although it would be "easy to escape those onerous duties by granting the motion for my disqualification." (Petitioners' Appendix B, p. 13a). He did *not* rely on the "duty to sit" concept in making that decision, and his Opinion is clear in that regard. A judge's awareness of the burden which his disqualification, and the consequent reassignment of the case, would place on other judges in the district should not be confused with reliance on the "duty to sit" concept.

Section 455 was not intended to provide a vehicle by which a judge could escape the obligations of complex litigation. In fact, the Court of Appeals for the Tenth Circuit, the same Court of Appeals cited by the defendants as correctly construing the Amended Section 455(a), in *United States v. Bray*, 546 F. 2d 851, at 857 (10th Cir. 1976), recently described a judge's professional responsibility as follows: "A trial judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true."

Judge Boldt obviously recognized that a motion alleging bias and prejudice on the part of the trial judge which, when examined, shows simply that the litigant is dissatisfied with certain rulings or does not like a particular judge, is not adequate to require disqualification. *United States v. Bray, supra; United States v. Goeltz*, 513 F. 2d 193 (10th Cir.), *cert. denied* 432 U. S. 830 (1975).

(b) Petitioners Are Unable to Show Bias, Prejudice, Partiality or Impropriety.

Neither Section 144 nor Section 455 was intended to "grant an automatic veto power in order that counsel might choose a judge who meets with their approval." *Samuel v. University of Pittsburgh*, 395 F. Supp. 1275, 1277 (W. D. Pa. 1975), *rev'd on other grounds*, 538 F. 2d 991 (3d Cir. 1976).

Federal judges are presumed to be impartial. *United States v. Mitchell*, 377 F. Supp. 1312, 1316 (D. D. C.), *petition for mandamus denied*, 502 F. 2d 375, *cert. denied*, 418 U. S. 955 (1974).

The presumption of impartiality cannot be lightly discarded. Judges regularly rule upon and exclude evidence; they rule upon motions to suppress; they receive and read presentencing reports; they participate in settlement negotiations, and they proceed with litigation which has been partially settled; all without disqualification. The statutory provisions concerning disqualification of federal judges should not be used as a means to intimidate the judiciary. As discussed herein, *not one* of the Petitioners' allegations substantiates charges that the district court's impartiality can reasonably be questioned.

Defendants have constructed an argument based on *their own* attacks on the district court. Confronted with a similar situation in *In Re: Union Leader Corporation*, 292 F. 2d 381 (1st Cir. 1961), the First Circuit denied a Petition For Mandamus to review the trial court's refusal to recuse itself. The Appellate Court quoted the trial judge as follows:

"It is true that your client has been in the business of attacking me, but I haven't attacked your client. And I regard his misconduct as giving no basis for alleging misconduct on my part." 292 F. 2d at 388.

In denying the Petition for Mandamus, the First Circuit stated:

"A judge lives in an atmosphere of strife, in which, by nature and experience, he is expected to be a man of 'fortitude.' (citations omitted) He must continually rule against one party or another. No judge can be so sanguine as to believe that he is never the object of disapproval and criticism directed to something more personal than his abstract judicial actions. If such disapproval is brought openly to his attention he does not automatically change from benign to biased. It is neither practical nor reasonable to liken a judge to an ostrich, unconcerned so long as his head is in the sand." 292 F. 2d at 389.

It is well settled that personal bias requiring a trial judge to disqualify himself must be of extra-judicial origin which renders his participation in the case unfair, in that it results in an opinion formed by the judge on a basis other than what he learned by his participation in the case. *United States v. Grinnell Corp.*, 384 U. S. 563 (1966); *United States v. Bray*, *supra*; *United States v. Montecalvo*, 545 F. 2d 684 (9th Cir. 1976); *United States v. Thompson*, 483 F. 2d 527 (3rd Cir. 1973); *Davis v. Cities Service Oil Co.*, 420 F. 2d 1278 (10th Cir. 1970). Petitioners allege that the District Court's personal friendship with one of plaintiffs' counsel supports charges of impropriety, personal bias and prejudice. That contention is incorrect as a matter of fact and of law. Impartiality is clearly demanded of our judiciary. Dictates of due process require a trial in a fair and unbiased tribunal. *Ward v. Village of Monroeville*, 409 U. S. 57 (1972). However, no Court has ever held that friendship may not exist between a judge and an attorney. It is respectfully suggested that if such

friendships were a basis for disqualifying a judge, the federal bench would soon be empty.

Petitioners respectfully submit that, accepting the misleading allegations of Petitioners as verity, the allegations still do not support charges of bias or prejudice on the part of the district court.

(c) Petitioners' Motion to Disqualify the District Judge Was Not Timely Filed.

Petitioners also failed to comply with the timeliness requirement of Section 144. Petitioners were dilatory in filing their Motion for Disqualification, and on that basis alone, the district court could have denied the motion. *See, e.g., United States v. Hurd*, 549 F. 2d 118 (9th Cir. 1977) (affidavit filed 5 days after the start of trial is untimely); *Knoll v. Socony Mobil Oil Co.*, 369 F. 2d 425 (10th Cir. 1966) (24 days after case is set for trial is too late); *Chessman v. Teets*, 239 F. 2d 205 (9th Cir.) *rev'd on other grounds*, 354 U. S. 156 (1956) (29 days after affiant became aware of facts is too late). Furthermore, Petitioners' informal suggestions that the district court withdraw from the litigation do not excuse their untimely filing of the Section 144 motion. *See, e.g., United States v. De La Fuente*, 548 F. 2d 528 (5th Cir. 1977); *Brotherhood of Loc. Fire and Eng. v. Bangor and Aroostock R. Company*, 380 F. 2d 570 (D. C. App. 1967) *cert. denied*, 389 U. S. 970 (1968).

Stringent construction of the time requirement of 28 U. S. C. § 144 prevents litigants from trying "to sample the temper of the Court before deciding whether to file the affidavit." *Hall v. Burkett*, 391 F. Supp. 237 (W. D. Okla. 1975), citing *Peckham v. Ronrico Corp.*, 288 F. 2d 841 (1st Cir. 1961).

In summary, Petitioners have plainly failed in their attempt to demonstrate that they are entitled to the writ.

CONCLUSION.

For the reasons set forth above, the Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit should be denied.

Respectfully submitted,

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*Attorneys for Real Parties
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CERTIFICATE OF SERVICE.

I hereby certify that on this 29th day of July, 1977, three copies of the Brief On Behalf Of Real Parties In Interest In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit were served, in compliance with Supreme Court Rule 33, by first class mail, postage prepaid, on each of the individuals listed on the current official Service Lists. I further certify that all parties required to be served have been served.

/s/ HAROLD E. KOHN,
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Appendix.

UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

No. 76-3303

IN RE: SUGAR ANTITRUST LITIGATION
 MDL 201
 BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,
 v.

AMALGAMATED SUGAR COMPANY, et al.,
Defendants-Appellants.

ORDER.

(Filed January 28, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration of the motion to dismiss, the appeal is dismissed for lack of jurisdiction. *Blackie v. Barrach*, 524 F. 2d 891 (9th Cir. 1975).

SHIRLEY M. HUFSTEDLER
 ANTHONY M. KENNEDY
U. S. Circuit Judges

Mo Cal 1/24/77

(A1)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—
No. 76-3303
—

BALDI CANDY COMPANY, et al.,
Plaintiffs-Appellees,

v.

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, AMERICAN CRYSTAL SUGAR COMPANY, a dissolved New Jersey corporation, AMERICAN CRYSTAL SUGAR COMPANY, a Minnesota agricultural cooperative, U and I INCORPORATED (formerly Utah-Idaho Sugar Company),

Defendants-Appellants,

— AND RELATED CASES

—
ORDER.
—

(Filed June 6, 1977)

Before: HUFSTEDLER and KENNEDY, *Circuit Judges*

Upon due consideration, the petition for a rehearing is denied. Our decision in *Blackie v. Barrack* (9th Cir. 1975) 524 F. 2d 891, *cert. denied* (Oct. 4, 1976) 45 U. S. L. W. 3249, is dispositive in spite of appellants' argument that *Blackie's* application to their effort to secure an interlocutory appeal heralds a per se rule of non-

appealability of class certification orders. The present petition provides us no occasion to express an opinion as to what our reception would be to an appeal from a certification order in a different case.¹

Petition for Rehearing is DENIED.

1. It is noteworthy that even under the practice in the Second Circuit, the certification order in the present case would probably not be appealable until final judgment. (See *Parkinson v. April Industries, Inc.* (2d Cir. 1975) 520 F. 2d 650, 658 ("Our court in *General Motors* recognized that an appellant would not be able to satisfy the three-pronged test for an immediate interlocutory appeal if he only questioned the propriety of the discretionary ruling of a trial judge that the requirements of Rule 23(b)(3) had been met. . . . The appellants' claims concern only the discretionary ruling of the district judge that the prerequisites of Rule 23(a) . . . and Rule 23(b)(3) have been satisfied We therefore dismiss the appeal.").)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT—
No. 76-2919
—IN RE: SUGAR ANTITRUST LITIGATION
(M. D. L. No. 201)AMERICAN CRYSTAL SUGAR COMPANY, a dissolved
New Jersey corporation, AMERICAN CRYSTAL
SUGAR COMPANY, a Minnesota agricultural
cooperative, AMSTAR CORPORATION, CALI-
FORNIA BEEF GROWERS ASSOCIATION, THE
AMALGAMATED SUGAR COMPANY, THE
GREAT WESTERN SUGAR COMPANY, and U
AND I INCORPORATED,*Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,*Respondent,*ANTHONY J. PIZZA FOOD PRODUCTS
CORPORATION, et al.,*Real Parties in Interest.*PETITION FOR WRIT OF MANDAMUS
—MEMORANDUM ORDER.
—(Filed June 7, 1977)
—Before: HUFSTEDLER and GOODWIN, *Circuit Judges*Petitioners seek a writ of mandamus to overturn the
respondent-district court's certification of fifteen classes

and three subclasses in a treble damages antitrust suit alleging price fixing under Section 1 of the Sherman Act, 15 U. S. C. § 1 (1973). Petitioners argue, *inter alia*, that the district court abused its discretion in finding that the antitrust action satisfied the prerequisites to class action treatment under Fed. R. Civ. P. 23(a) and 23(b)(3). For example, they allege that common questions of fact or law (*see* Fed. R. Civ. P. 23(b)(3)) do not predominate over individual questions in the present action where the antitrust claims involve a variety of geographic and product markets as well as different pricing and distributing structures. Furthermore, petitioners argue that conflicts exist among class members which preclude a finding that the class representatives will adequately protect the interests of the class. (*See* Fed. R. Civ. P. 23(a)(4).)

In *Kerr v. United States District Court for the Northern District of California* (1976) 426 U. S. 394, the Supreme Court recently underscored the extraordinary nature of the mandamus remedy. ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations . . . amounting to a judicial 'usurpation of power'. . . ." (*Id.* at 402.)) This circuit has interpreted *Kerr* in *Arthur Young & Co. v. United States District Court* (9th Cir. 1977) 549 F. 2d 686 to require a petitioner seeking mandamus to show that the district court committed "clear and indisputable" error *and* that no "alternative procedural means" are available to correct this error. (*Id.* at 692 (" . . . If we determine that the error, if any, is not 'clear and indisputable,' or that there are alternative means available to correct the error . . . the writ will not issue. . . . Interference with the trial court's control over its own proceeding is not a matter to be undertaken lightly or on the basis of mere speculation by the parties . . . about what may occur at some future date." *Id.*)).

Petitioners have not demonstrated that they are entitled to the writ under the *Arthur Young* test. Without passing on the merits of the lower court's certification, we hold that petitioners have not made a threshold showing of "clear and indisputable" error to invoke the writ. (See *Windham v. American Brands, Inc.* (4th Cir. 1976) 539 F. 2d 1016, 1021 (Although defendants argued that class action treatment was improper where differences in product and geographic markets as well as conflicts among class members created predominating individual questions as to proof of impact, the court noted that "there is almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act."); *Philadelphia Electric Co. v. Anaconda American Brass Co.* (E. D. Pa. 1968) 43 F. R. D. 452, 457-58; *Siegel v. Chicken Delight, Inc.* (N. D. Cal. 1967) 271 F. Supp. 722, 726 ("It is the existence . . . of the alleged conspiracy to substantially lessen competition in the market place, to illegally restrain trade . . . and the conduct that established said conspiracy that form the common questions of law or fact in this case "The fact that the members of the class vary in size, type and market locations and the fact that there may be peculiar differences between them with respect to the determination of their damages . . . does [sic] not render this class action improper"); *In re Master Key Antitrust Litigation* (D. Conn. 1975) 70 F. R. D. 23, 26, *appeal dismissed* (2d Cir. 1975) 528 F. 2d 5; *State of Illinois v. Harper & Row Publishers, Inc.* (N. D. Ill. 1969) 301 F. Supp. 484, 492-94; Von Kalinowski, 14 Antitrust Law and Trade Regulation § 108.03[4], p. 108-81 (1974) ("The typical issue regarding violations is often the existence of a single underlying conspiracy. It does not necessarily matter that the victims of that conspiracy may have suffered in different ways

depending upon the nature of their respective relationship with the conspirators. The essential issue common to all plaintiffs is that they must first prove a conspiracy before there can be any contention as to questions idiosyncratic to individual class members.") Nor have petitioners shown that alternative procedural means are unavailable to correct the district court's allegedly improper certification.¹ (E.g., Fed. R. Civ. P. 23(c)(4) provides a mechanism for handling conflicts among class members should they arise in the course of litigation. See *Blackie v. Barrack* (9th Cir. 1975) 524 F. 2d 891, 909, *cert. denied* (October 4, 1976) 45 U. S. L. W. 3249 (" . . . As a result, courts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit."); Von Kalinowski, *supra*, at § 108.02[5], p. 108-56.)

The decision to issue a writ of mandamus is one totally within this court's discretion. We refused to grant the writ in *Arthur Young, supra*, because it "would certainly have [had] the deleterious effect of encouraging frivolous and

1. The district court's certification of the antitrust class action is appealable upon final judgment. Petitioners do not satisfactorily explain why the availability of such an appeal is not an "alternative procedural means" to mandamus. Petitioners merely invoke the familiar battle-cry of class action defendants that certification of a massive class action forces defendants to settle the suits. But we have rejected this argument in the interlocutory appeals context (see *Blackie v. Barrack* (9th Cir. 1975) 524 F. 2d 891, 899, *cert. denied* (Oct. 4, 1976) 45 U. S. L. W. 3249 (" . . . The fairness of the pressure—i.e., the sociological merits of the small claims class action—is not a question for us to decide. The fact is that Congress, by authorizing . . . Rule 23(b)(3), created a vehicle to put small claimants in an economically feasible litigating posture.")), and the soundness of the argument has been disputed on empirical grounds. (See Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 Geo. L. J. 1123, 1136 (1974); DuVal, The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II), 1976 ARA Res. J. 1273, 1347-8.)

dilatory petitions under the guise of requests for 'supervision' or 'advice' from the Court of Appeals on matters traditionally within the exclusive sphere of the trial court's discretion, at least until final judgment has been entered." (549 F. 2d at 691, n. 7.) Petitioners have not persuaded us why this language does not similarly bar the exercise of our discretion in their favor in the present suit.

Petition for writ of mandamus is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

—
No. 76-2919
—

AMERICAN CRYSTAL SUGAR CO., a dissolved New Jersey corp., AMERICAN CRYSTAL SUGAR CO., a Minnesota agricultural cooperative, AMSTAR CORPORATION, CALIFORNIA BEET GROWERS ASSOCIATION, THE AMALGAMATED SUGAR COMPANY, THE GREAT WESTERN SUGAR CO., and U & I INCORPORATED,

Petitioners,

v

U. S. DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA.

Respondent,

ANTHONY J. PIZZA FOOD PRODUCTS CORP., et al.,
Real Parties in Interest.

ORDER.

(Filed June 27, 1977)

Before: HUFSTEDLER, *Circuit Judge*

Upon due consideration, petitioners' motion for extension of time to July 12, 1977 in which to file a petition for rehearing is granted.

DOCKET No. 250

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION MDL-250 IN RE FOLDING CARTON ANTITRUST LITIGATION.

ORDER ASSIGNING TRANSFEREE JUDGE.

(Filed October 6, 1976)

It is hereby ordered that all previous orders of the Panel transferring actions in this litigation to the Northern District of Illinois for coordinated or consolidated pretrial proceedings pursuant to 28 U. S. C. § 1407 be amended to assign these actions to Judge Edwin A. Robson along with the previously-assigned Judge Hubert L. Will. Each transferee judge shall have total jurisdiction over the coordinated or consolidated pretrial proceedings in this litigation and each judge may act individually and/or jointly with respect to those proceedings.

FOR THE PANEL:

JOHN MINOR WISDOM,
John Minor Wisdom,
Chairman.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—
Master File No. MDL 201
—

IN RE SUGAR ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

No. C77-0200 GHB

A & P BAKERY SUPPLY & EQUIPMENT CO., INC.,
Plaintiff,

v.

AMSTAR SUGAR CO., *et al.*,
Defendants.

No. C77-0194 GHB

CONTINENTAL COFFEE COMPANY OF FLORIDA,
Plaintiff,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C77-0198 GHB

FEDERAL BAKE SHOPS, INC., *et al.*,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

OPINION AND ORDER RE CLASS ACTIONS.

GEORGE H. BOLDT,
Sr. United States District Judge
No. C77-0197 GHB
SETHNESS GREENLEAF, INC., *et al.*,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C77-0189 GHB
A. C. JORDAN, *et al.*,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C77-0199 GHB
EUGENE KLEIN, *et al.*,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C77-0191 GHB
WALDORF BAKERS, INC.,
Plaintiffs,

v.

AMSTAR CORP., *et al.*,
Defendants.

No. C77-0708 GHB
SAMBO'S RESTAURANTS, INC.,
Plaintiffs,

v.

AMALGAMATED SUGAR CO., *et al.*,
Defendants.

No. C75-1131 GHB
SEECO, INC., AND W. R. GRACE & CO.,
Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY, *et al.*,
Defendants.

No. C75-1808 GHB
MISSOURI FARMERS ASSOCIATION, INC.,
Plaintiffs,

v.

GREAT WESTERN SUGAR COMPANY, *et al.*,
Defendants.

Pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, various plaintiffs move this Court for an order determining that certain actions in this litigation should proceed as class actions.

Plaintiffs in *Jordan, Sethness Greenleaf, Continental Coffee, Federal Bake Shops, Klein, Waldorf and A & P Bakery* have filed a consolidated motion requesting:

(1) That plaintiffs in *Waldorf, Sethness Greenleaf, and Federal Bake Shops* be designated class representa-

tives for a class of industrial-user purchasers of refined sugar, consisting of all persons or private entities doing business as industrial sugar users in the Eastern Market¹ who have purchased refined sugar for use or incorporation in producing, manufacturing or processing foodstuffs, including beverages, for human or animal consumption, and who have not offered such sugar for resale as sugar, against the defendants listed below:

(2) That plaintiffs in *Klein and Jordan* be designated class representatives for a class of retail grocer purchasers of refined sugar, consisting of all persons or private entities doing business as retail grocers in the Eastern Market who have purchased refined sugar for the eventual resale of such sugar for use or incorporation by the consumer in a variety of foodstuffs or beverages for human or animal consumption, against the defendants listed below;

(3) That plaintiffs in *Continental Coffee and A & P Bakery* be designated class representatives for a class of wholesaler purchasers of refined sugar, consisting of all persons or private entities in the Eastern Market who directly or indirectly purchased refined sugar as wholesalers for resale as sugar in either the original package or repackaged, against the defendants listed below:

- * Amalgamated Sugar Company
- * American Crystal Sugar Company
- * American Crystal Sugar Company
of Fargo, North Dakota
- * California & Hawaiian Sugar Company

1. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Maryland, West Virginia, Virginia, Michigan, Ohio, Kentucky, North Carolina, South Carolina, Tennessee, Mississippi, Alabama, Georgia, Florida, Arkansas, Louisiana, New Jersey, Delaware, and the District of Columbia.

- * California Beet Growers Association
- * Consolidated Foods Corp.
- * Great Western Sugar Company
- * Holly Sugar Corporation
- * Imperial Sugar Company
- * National Sugarbeet Growers Federation
- * Utah-Idaho Sugar Company
- ** Buckeye Sugars, Inc.
- ** Northern Ohio Sugar Company
- ** Monitor Sugar Company
- ** Godchaux-Henderson Sugar Co., Inc.
- ** Southdown Sugars, Inc.
- ** Supreme Sugar Company, Inc.
- ** The South Coast Corp.

Plaintiff in *Sambo's* seeks certification of a class consisting of all individuals or entities located in the Eastern Market, engaged in the preparation and manufacture of food products, who purchased refined sugar directly or indirectly from certain defendants in liquid or dry form, in bags or in bulk during a period beginning sometime in 1949 and continuing to 1977. The following defendants are named in *Sambo's*:

- Amalgamated Sugar Company
- American Crystal Sugar Company
- California and Hawaiian Sugar Company
- Consolidated Foods Corp.
- Godchaux-Henderson Sugar Co., Inc.
- Great Western Sugar Company
- Holly Sugar Corporation

* These defendants previously were involved in only MDL-201.

** These defendants were not previously named in either MDL-201 or MDL-201A.

Imperial Sugar Co.
 National Sugarbeet Growers Federation
 Union Sugar Division
 Utah-Idaho Sugar Co.

Finally, plaintiffs in *Seeco* and *Missouri Farmer's Association* have moved for certification of the following class:

All persons entities in the Eastern Market who from January 1, 1955, to the present, purchased molasses for industrial use in the manufacturing, compounding, formulating or mixing of animal feed and other agricultural products.

Defendants in these two actions are:

Amstar Corp.
 Amalgamated Sugar Co.
 American Crystal Sugar Co.
 California and Hawaiian Sugar Co.
 Consolidated Foods Corp.
 Great Western Sugar Co.
 Great Western Sugar Co.
 Holly Sugar Corp.
 National Sugarbeet Growers Federation
 Utah-Idaho Sugar Co.

BACKGROUND.

On December 19, 1974, the United States instituted two criminal actions and three civil injunctive proceedings in the Northern District of California against several sugar refiners charging them with violations of Section One of the Sherman Act, 15 U. S. C. Section 1. Subsequently, a large number of private antitrust actions were filed in several federal district courts. On June 2, 1975 the Judicial

Panel on Multidistrict Litigation transferred many of these actions to the Northern District of California for coordinated or consolidated pretrial proceedings pursuant to 28 U. S. C. Section 1407 and assigned them to the undersigned judge, sitting by designation pursuant to 28 U. S. C. Section 292(b). *In re Sugar Industry Antitrust Litigation*, 395 F. Supp. 1271 (J. P. M. L. 1975) (MDL-201). There are currently over 100 actions pending before this court, a significant number of which are class actions.

The complaints in the litigation before this court differ slightly but generally allege that defendants and certain co-conspirators conspired to and did fix, stabilize and raise the basic price for refined sugar, established prepaid freight applications and eliminated and reduced allowances to customers in each of the marketing areas known in the sugar industry as the Chicago-West, California-Arizona and Intermountain-Northwest territories. Moreover, certain complaints allege that defendants and several co-conspirators conspired to and in fact did restrain the sale and use of private label sugar, charge customers in some areas discriminatorily higher prices than customers in other areas, and adopt the so-called "basing point" system of pricing. It is further alleged that as a result of the conspiracy, plaintiffs paid higher prices for refined sugar than would have been paid if there had been no conspiracy. Finally, two complaints allege that certain defendants conspired to fix, raise, maintain and stabilize the price of molasses in the three affected market areas. Plaintiffs seek to recover treble damages and reimbursement of costs and attorneys' fees as compensation for the alleged injuries.

Defendants named in some or all of these complaints include, *inter alia*, Amalgamated Sugar Company; American Crystal Sugar Company; American Crystal Sugar

Company of Fargo, North Dakota; Amstar; California Beet Growers Association; California & Hawaiian Sugar Company; Great Western Sugar Company; Holly Sugar Corporation; Imperial Sugar Company; National Sugar-beet Growers Federation; SuCrest Corporation; Utah-Idaho Incorporated; and Union Sugar Division, Consolidated Foods Corporation (the Western defendants).

On May 20, 1976 this court issued an opinion and order certifying various classes and subclasses of industrial sugar users, wholesalers, retail grocers, and purchasers of molasses for use in processing agricultural products in the Chicago-West, California-Arizona and Intermountain-Northwest markets. In addition, individual classes of governmental entities were certified for each of the Western states represented in the litigation. *In re Sugar Industry Antitrust Litigation* (MDL-201), 1977-1 CCH Trade Cas. ¶ 61,373 (N. D. Cal. 1976).² On September 17, 1976, two additional governmental entity classes were certified.

An additional branch of this litigation, entitled *In re Sugar Industry Antitrust Litigation (East Coast)*, was established by the Panel in the Eastern District of Pennsylvania and assigned to the Honorable Edward N. Cahn for coordinated or consolidated pretrial proceedings pursuant to 28 U. S. C. § 1407. *In re Sugar Industry Antitrust Litigation*, 399 F. Supp. 1397 (J. P. M. L. 1975) (*Freedman*); 405 F. Supp. 1404 (J. P. M. L. 1975) (*Hudson*). This branch of the litigation has been denominated MDL-201A.

MDL-201A now includes approximately 20 actions. The plaintiffs in MDL-201A are various industrial and institutional users, wholesalers and retail grocers, located

2. On June 7, 1977, the United States Court of Appeals for the Ninth Circuit denied a petition for a writ of mandamus to set aside the May 20, 1976 class certification order.

in the Eastern United States, many of whom are suing individually as well as on behalf of others similarly situated. Several purported governmental entity class actions are also pending in MDL-201A. The principal defendants in these actions are Amstar; Borden, Inc. and several of its subsidiaries; CPC International, Inc.; Michigan Sugar Company; National Home Products Corporation; The National Sugar Refining Company; Savannah; and Sucrest Corporation (including Revere Sugar Co.). The complaints also name several corporations, firms and individuals as co-conspirators.

On October 21, 1976, Judge Cahn certified separate classes of industrial users, retail grocers and institutional users in the Eastern market. *In re Sugar Industry Antitrust Litigation* (MDL-201A), 73 F. R. D. 322 (E. D. Pa. 1976). Judge Cahn declined to certify an Eastern wholesaler class because the named plaintiff in the purported wholesaler class lacked standing. *Id.* at 340. A subsequent motion to certify an Eastern wholesaler class, brought by a different named plaintiff, presently is *sub judice* in MDL-201A. And several motions to certify a variety of governmental entity classes are also pending before Judge Cahn.

MOTIONS FOR CLASS CERTIFICATION

On January 17, 1977, the Panel transferred a number of actions to the Northern District of California pursuant to 28 U. S. C. § 1407. *In re Sugar Industry Antitrust Litigation* (MDL-201), 427 F. Supp. 1018 (J. P. M. L. 1977). Seven of the ten actions presently before this court on motions for class certification were included in these recently transferred actions. These seven actions may be summarized as follows:

(1) In *Jordan, Sethness Greenleaf, Continental Coffee* and *Federal Bake Shops*, the named plaintiffs seek to represent various classes of purchasers of refined sugar in the Eastern market, allege a national conspiracy and include defendants heretofore involved exclusively in either MDL-201 or MDL-201A, as well as defendants Amstar and SuCrest. Several defendants not previously involved in either MDL-201 or MDL-201A are also added as defendants in the complaints in *Sethness Greenleaf, Continental Coffee* and *Federal Bake Shops*.

(2) In his complaint, the plaintiff in *Klein* seeks to represent a national class of retail grocery stores, alleges a national conspiracy, and names defendants heretofore involved in only MDL-201 or MDL-201A, Amstar and SuCrest, and new defendants.

(3) Plaintiff in *Waldorf* apparently seeks to represent a class composed of Eastern industrial users, alleges a regional (Eastern) conspiracy in his complaint, and names defendants previously involved in only MDL-201 or MDL-201A, as well as Amstar and SuCrest.

(4) Plaintiffs in *A & P Bakery* brings its action on behalf of Eastern wholesalers, alleges a regional (Eastern) conspiracy in its complaint, and includes defendants heretofore involved in only MDL-201 or MDL-201A, Amstar and SuCrest, and new defendants.

Although plaintiffs in *Jordan, Sethness Greenleaf, Continental Coffee, Federal Bake Shops, Klein, Waldorf* and *A & P Bakery* have not moved to amend their complaints, the consolidated motion for class certification filed by these plaintiffs excludes all defendants previously involved only in MDL-201A, as well as defendants Amstar and SuCrest. In addition, all plaintiffs, including *Waldorf* and *A & P*, have in effect alleged a national conspiracy in the consolidated motion.

The three other actions now before this court on class certification motions may briefly be summarized as follows. *Sambo's* is brought on behalf of a class of Eastern industrial users, alleges a national conspiracy, and names defendants involved in MDL-201, Amstar and SuCrest, and one new defendant. Plaintiffs in *Seeco* and *Missouri Farmers Association* have already been certified as representatives of a class of all persons or entities in the Chicago-West, California-Arizona and Intermountain-Northwest territories who purchased molasses for industrial use in the manufacture of animal feed and other agricultural products. *In re Sugar Industry Antitrust Litigation* (MDL-201), 1977-1 Trade Cas. (CCH) ¶ 61,373 (N. D. Cal. 1976), as modified by *In re Sugar Industry Antitrust Litigation*, MDL-201 (N. D. Cal., order filed August 16, 1976). Plaintiffs in *Seeco* and *Missouri Farmers Association* now seek certification of a similar class of Eastern industrial users of molasses. Defendants named in *Seeco* and *Missouri Farmers Association* include Western defendants and Amstar.

CONSOLIDATED MOTION AND SAMBO'S³

The court has carefully examined and thoroughly reviewed all of the motions, supporting and opposing memoranda, affidavits and exhibits incorporated therein submitted to the court by plaintiffs and defendants. And, the court has also closely considered the oral arguments presented on May 26, 1976. From this in depth analysis, the court is fully satisfied that plaintiffs' consolidated motion and Sambo's motion for class certification should be and hereby are denied.

The consolidated motion of the movants basically contends: (1) that the defendants presently before Judge

3. The consolidated motion for class action certification was filed in *Jordan, Sethness Greenleaf, Continental Coffee, Federal Bake Shops, Klein, Waldorf* and *A & P Bakery*.

Cahn may be financially unable to satisfy a judgment which might be entered against them in MDL-201A; and (2) that there is a possibility that no judgment will be entered against those defendants presently in MDL-201A, but that a conspiracy would be proved against the proposed additional defendants.

In addition, Sambo's contends that unless its class certification motion is granted, certain western defendants and their affiliates who sold sugar in the eastern market who have not been named in MDL-201A, may escape liability for these sales.

With the exception of the Eastern wholesaler class sought in *Continental Coffee* and *A & P Bakery*, all Eastern purchasers of refined sugar which the present movants seek to represent are already included in the industrial user, institutional user and retail grocer classes certified by Judge Cahn.⁴ The certified classes in MDL-201A include all persons or private entities that have purchased refined sugar in the Eastern market, and are not restricted to those who purchased refined sugar from the defendants named in the various actions in MDL-201A. *In re Sugar Industry Antitrust Litigation*, (MDL-201A), *supra*, 73 F. R. D. at 359. Thus in their present class certification motions, movants are requesting this court to certify classes identical to those already certified by Judge Cahn, but against different defendants.

Among the factors that the court must consider under Rule 23(b)(3) is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Rule 23(b)(3)(B). This court is fully satisfied that the Eastern class representatives and their counsel have and will continue to adequately

4. A motion for certification of an Eastern wholesaler class presently is *sub judice* before Judge Cahn. See p. 6-7, *supra*.

represent and protect the interests of the Eastern class members. Indeed, there is no evidence that those members are at any significant disadvantage because the class representatives did not elect to name every sugar refiner that sold sugar in the Eastern market during the relevant time period.

Apart from speculation by counsel for movants in the consolidated motion, there is no indication that defendants in MDL-201A are not amply capable of satisfying any judgment that may eventually be entered in that litigation, or that Eastern class representatives will be unable to establish that the defendants already named in MDL-201A were involved in any conspiracy which allegedly affected sales of refined sugar in the Eastern market.

The Eastern class representatives have named all the major Eastern sugar refiners as defendants in MDL-201A, including Amstar, Borden and SuCrest. In his Opinion Concerning The Propriety of Class Actions, Judge Cahn clearly recognized that the Eastern class representatives had not elected to sue every conceivable defendant. Judge Cahn described the Eastern defendants, who have been excluded from the consolidated and Sambo's motions now before this court, as the "principal defendants" and noted that the Eastern class representatives also charged "various corporations, firms and individuals not named as defendants in these complaints . . . as co-conspirators who participated in the violations alleged therein, and who performed acts and made statements in furtherance of the averred combinations and conspiracies." *In re Sugar Industry Antitrust Litigation* (MDL-201A), *supra*, 73 F. R. D. at 333. The fact that Eastern class representatives did not name all potential defendants in no way demonstrates that the interests of Eastern class members are not already fully and fairly represented. For exam-

ple, in *Dorfman v. First Boston Corp.*, 62 F. R. D. 466 (E. D. Pa. 1974), plaintiffs sued only the principal and managing underwriters of a debenture securities offering but did not name as defendants several of the brokerage firms who were members of the original underwriting syndicate. Chief Judge Lord certified the classes requested and, commenting on plaintiffs' decision not to name all the brokerage firms as defendants, stated:

A plaintiff, even one purporting to represent a class, surely must exercise some discretion in choosing his defendants. Without passing in any way on the merits of an action against other members of the original underwriting syndicate, we believe plaintiffs' decision to name only the principal and managing underwriters was within the realm of propriety and does not prejudice the rights of absent class members. *Id.* at 473.

See also *State of Washington v. American Pipe & Construction Co.*, 280 F. Supp. 802, 804 n. 5 (S. D. Cal. 1968).

While plaintiffs in the consolidated motion seek to represent classes composed of all Eastern wholesalers, retail grocers and industrial users, plaintiff in *Sambo's* seeks certification of a class composed only of Eastern industrial users who purchased refined sugar from certain western defendants and their affiliates which have not been named as either defendants or co-conspirators in MDL-201A. *Sambo's* argues that unless the class it seeks is certified those western defendants and their affiliates will escape liability for their sales of refined sugar in the Eastern markets. *Sambo's* fears are unwarranted. It is clear that any sales of refined sugar in the Eastern market which may have been affected by the alleged conspiracy in MDL-201A are already involved in the actions before Judge

Cahn. In *State of Washington v. American Pipe & Construction Co.*, *supra*, plaintiffs in a Sherman Act price-fixing action sought to recover from a named defendant for, *inter alia*, injuries sustained by purchases from non-defendants' non-conspirators. Plaintiffs argued that the alleged conspiracy increased the overall price level in the market, and that non-conspirators sold their products under this "umbrella" at higher prices than would have prevailed absent the conspiracy. The court held:

... Sales by non-conspirators to these plaintiffs are clearly within the area of the economy in which competitive conditions allegedly disintegrated. The underlying purpose of the presumed conspiracy was to raise pipe prices by ending competitive bidding. If the alleged conspirators succeeded in this goal, [defendant] American is liable for damages sustained on all sales which were affected by the elimination of competition. The identity of the pipe seller, whether conspirator or not, is irrelevant. Plaintiffs' claims of injury arise directly from the proscribed activity. The alleged conspirators intended to raise the prices these claimants paid for the pipe which they manufactured. In doing so they may have also brought about increases in the prices charged by non-collaborators. If plaintiffs can establish as a matter of fact (1) that they paid more for pipe purchased from non-defendant non-conspirators than would have been paid absent the alleged conspiracy, and (2) that American's alleged conspiracy and (2) (sic) that American's alleged participation in anticompetitive conspiracy was the cause of such over-payment, nothing in the law will preclude recovery from American. *Id.* at 807.

See also *Wall Products Co. v. National Gypsum Co.*, 357 F. Supp. 832, 840 (N. D. Cal. 1973).

Rule 23(b)(3)(D) also provides that the court must consider "the difficulties likely to be encountered in the management of a class action." Throughout the proceedings in MDL-201T, this court, Judge Cahn and all parties have, pursuant to the mandate of the Judicial Panel on Multidistrict Litigation, worked to develop a fair and efficient procedure by which to manage this massive and complex litigation. The court is convinced that granting the consolidated and *Sambo's* motions would impede the effective management of these cases.

Accordingly, for the reasons stated herein, the motions of plaintiffs in *Jordan*, *Sethness Greenleaf*, *Continental Coffee*, *Federal Bake Shops*, *Klein*, *Waldorf*, *A&P Bakery* and *Sambo's* for class certification are denied.

MOLASSES CLASS CERTIFICATION ⁵

The court has fully reviewed and carefully considered the motion, supporting and opposing memoranda, affidavits and exhibits incorporated therein submitted to the court in connection with the present motion as well as the prior motion for certification of molasses classes in the Chicago-West, California-Arizona and Intermountain-Northwest territories by plaintiffs and defendants. Also, the court has examined a copy of the transcript of the May 26, 1977 hearing at which the motion was argued.

Based upon this review, the court recognizes that the record before it does not include sufficient reliable economic data relative to the structure of the molasses industry to allow an informed judgment on each of the requirements of Rule 23, F. R. Civ. P. Therefore, the court is satisfied that counsel for plaintiffs and defendants in *Seeco* and *Missouri Farmers Association* should file with

5. This motion for certification of an Eastern agricultural class was filed by plaintiffs in *Seeco* and *Missouri Farmers Association*.

the Court, within 30 days, an affidavit by an economist of their own choosing setting forth the structure and practices of the agricultural molasses industry in each of the four market areas and during the time periods involved in this litigation. Counsel for plaintiffs and defendants shall arrange for the parties' economists to confer in advance with a view of presenting to the Court a statement of agreed facts and principles. Those matters upon which the parties' economists do not agree may be the subject of separate affidavits.

By structure and practices the court has in mind the methods of distribution used, the chain of distribution, the approximate quantity and value sold annually, the market share of each defendant and the market share of non-defendants.

Any significant changes in the structure or practices of the industry during the last decade should also be reported.⁶

IT IS HEREBY SO ORDERED this 6th day of July 1977.

GEORGE H. BOLDT

George H. Boldt

Senior United States District Judge

6. MDL-201 and MDL-201A are closely related. Pursuant to the suggestion of the Judicial Panel on Multidistrict Litigation, Judge Cahn and the undersigned judge have acted in close collaboration.

Judge Cahn was on the bench in San Francisco throughout the hearing at which all matters pertaining to the subjects covered by this decision were presented in open court. Although signed by me, Judge Cahn concurs in every ruling stated in this decision.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—
MDL #201
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—
IN RE SUGAR ANTITRUST LITIGATION
—

ORDER RE DEFENDANTS' MOTION
FOR EXTENSION OF TIME AND
ADDITIONAL DISCOVERY

(Text telephoned to Harold Kohn and Stephen Bomse
4:00 p.m. 10/7/75)

Defendants' motion for extending the time for service and filing of the consolidated brief opposing class action joined in by all defendants, with annexed contentions solely relating to specific defendants, and for additional discovery pertaining to class action was fully briefed and presented to the Court in oral argument at New York City, September 29, 1975. At the conclusion of the argument, the Court directed both plaintiffs and defendants to submit additional memoranda relating to stipulations, both of which have now been received and reviewed.

Upon full consideration of all memoranda and argument submitted, the Court hereby rules on defendants' motion as follows:

IT IS HEREBY ORDERED THAT:

1. Defendants shall serve and file their brief opposing class action on or before Monday, November 10, 1975.
2. The parties shall expeditiously complete all discover plaintiffs have agreed to in their statement re class

action discovery and shall expeditiously develop and execute written stipulations on all items plaintiffs have offered to stipulate solely as they pertain to class action determination.

3. Both parties shall promptly set up expedited schedule for the discovery authorized in the preceding paragraph, all of which shall be completed not later than Wednesday, November 5, 1975. The schedules shall include the specific interrogatories to be answered by plaintiffs and the specific plaintiffs to be deposed by defendants, which schedules shall be submitted to the Court at New York City not later than 2:00 p.m. Friday, October 10, 1975.

4. Plaintiffs' memorandum on class action in reply to that of defendants shall be served and filed on or before Monday, November 24, 1975.

5. Oral argument on the applications for class action shall be heard at San Francisco commencing at 9:30 a.m., Monday, December 1, 1975.

6. At the conclusion of the class action hearing, the Court will hear oral argument, if authorized, upon all then pending motions which have been fully briefed, and two copies of each brief mailed to reach Tacoma Chambers not later than November 24, 1975.

Dated at New York City this 7th day of October, 1975.

GEORGE H. BOLDT

George H. Boldt

Sr. United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—
MDL-201
—

IN RE SUGAR ANTITRUST LITIGATION

—
**ORDER RE PLAINTIFFS' MOTION TO DISMISS
DEFENDANTS' COUNTERCLAIMS.**
—

At the pretrial conference held December 9 and 10, 1975, the Court directed counsel for defendants asserting counterclaims to inform the Court which of the claims were compulsory and which were permissive pursuant to F. R. Civ. P. 13. Defendants responded by designating all the counterclaims compulsory and cited *Union Paving Company v. Downer Corp.*, 276 F. 2d 468 (9th Cir. 1960) for the proposition that compulsory counterclaims are those which bear a "very definite, logical relationship" to the main claim. The main contention of plaintiffs in this litigation, simply stated, is that defendants, sugar refiners and processors, have engaged in a broad, ongoing conspiracy to restrain trade with respect to the sale of refined sugar in various geographic markets.

Thus far, discovery on the merits has not been extensive in this litigation and the Court is reluctant to strike any of defendants' counterclaims on the basis of the argument of counsel rather than upon facts developed in discovery. On the other hand, some of defendants' counterclaims appear to have very little logical relationship to

plaintiffs' claims. In these circumstances, the Court denies plaintiffs' motion at this time, with leave to reassert it at the conclusion of discovery; provided, that no discovery shall be conducted concerning the counterclaims until the conclusion of pretrial discovery, unless otherwise ordered by the Court.

IT IS HEREBY SO ORDERED this 4th day of March, 1976.

GEORGE H. BOLDT
Sr. United States District Judge

**NOTICE TO PURCHASERS OF REFINED SUGAR
OF CLASS ACTION DETERMINATION AND
PROPOSED PARTIAL SETTLEMENT.**

THIS NOTICE APPLIES TO MEMBERS OF
THE INDUSTRIAL-USER, RETAIL GROCER AND
WHOLESALE CLASSES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—
Master File No. MDL 201
—

In re

SUGAR ANTITRUST LITIGATION

Pursuant to Rules 23(c)(2) and 23(e), Federal Rules of Civil Procedure, and Order of the United States District Court for the Northern District of California, PLEASE TAKE NOTICE:

There are now pending in the United States District Court for the Northern District of California approximately eighty-five civil actions seeking treble damages for alleged violations of the antitrust laws with respect to the sale of refined sugar. Certain of these actions were brought on behalf of various classes of plaintiffs. As more specifically described below, this notice applies to the industrial-user, retail grocer, and wholesaler classes. *Read this Notice carefully* and determine if you are a member of one or more of these classes. If you are a member of one of these classes, your rights may be affected by this Notice. This Notice does not express the opinion of the

Court as to the merits of the claims or defenses asserted by either side in this litigation, but is sent to inform you of the pendency of the litigation, and the proposed partial settlement, so that you can decide what steps to take in regard thereto.

THE LITIGATION

The complaints in this litigation differ slightly, but generally allege that defendants and certain co-conspirators conspired to and did fix, stabilize and raise the basis price for refined sugar, established prepaid freight applications, and eliminated and reduced allowances to customers. In addition, certain complaints further allege that defendants and certain co-conspirators conspired to and did restrain the sale and use of private label sugar, charge customers in some areas discriminatorily higher prices than customers in other areas, and adopt the so-called "basing point" system of pricing. It is also alleged that as a result of the conspiracy, plaintiffs and class members paid higher prices for refined sugar than would have been paid if there had been no conspiracy. Plaintiffs seek to recover treble damages and reimbursement of costs and attorneys' fees as compensation for the alleged injuries.

Defendants deny the above allegations, deny any liability, and disclaim that plaintiffs or any potential class members are entitled to recover damages. Defendants have also filed counterclaims against certain plaintiffs and class members, which plaintiffs contend are without merit.

DEFENDANTS

The following corporations and associations have been named as defendants in one or more of the class lawsuits now pending before the Court:

The Amalgamated Sugar Company
 American Crystal Sugar Company (a dissolved New Jersey corporation)
 American Crystal Sugar Company (a Minnesota agricultural cooperative)
 Amstar Corporation, previously known as American Sugar Company, including its Spreckels Sugar Division
 Imperial Sugar Company
 California and Hawaiian Sugar Company
 Great Western Sugar Company
 Holly Sugar Corporation
 Union Sugar Division of Consolidated Foods Corporation
 U and I Incorporated, formerly Utah-Idaho Sugar Company
 California Beet Growers Association
 National Sugarbeet Growers Federation
 SuCrest Corporation

PLAINTIFFS AND THE CLASSES

To qualify as a class member in the classes covered by this Notice, you must have (1) purchased refined sugar during the relevant time periods specified in the class definitions described below, (2) in one or more of the geographic areas covered, and (3) been either an industrial-user of refined sugar, a retail grocer, or a wholesaler of sugar at the time such purchases were made. You may be a member of more than one of these classes.

It is not necessary for you to have purchased refined sugar from one of the defendants, or for you to have purchased directly from a sugar manufacturer or refiner to qualify as a class member. However, the fact that you have purchased sugar does not necessarily entitle you to share in any recovery in this litigation.

Please read the following definitions carefully; they are necessary to your understanding of this Notice.

(1) Definition of Refined Sugar:

"Refined sugar" means any grade, type or form of saccharine product (other than molasses) derived from the processing of sugar beets or in the refining of raw cane sugar, all of which contain sucrose, dextrose or levulose.

(2) Definition of Geographic Areas Covered:

The three geographic market territories involved are:

Chicago-West—Consisting of the states of Indiana, Illinois, Iowa, Minnesota, Wisconsin, North Dakota, South Dakota, Kansas, Nebraska, Colorado, Montana, Missouri, New Mexico, Oklahoma, Texas and Wyoming (east of Rawlins)

California-Arizona—Consisting of the states of California and Arizona and the cities of Las Vegas and Reno

Intermountain-Northwest — Consisting of the states of Washington, Oregon, Utah, Idaho and Wyoming (west of Rawlins)

(3) Definition of Types of Refined Sugar Purchasers Covered By This Notice:

To qualify as a member of one of the classes covered by this notice, you must be one of the following types of refined sugar purchasers:

Industrial users—any person or entity who purchased refined sugar for use or incorporation in the production, manufacturing or process-

ing of foodstuffs or beverages for human or animal consumption and who did not offer that sugar for resale as sugar. Restaurants included in this class are limited to those who were during the relevant time:

(a) members of the National Restaurant Association, The Food Service and Lodging Institute or their local affiliated organizations, or

(b) franchisees or franchisors that were engaged in the business of franchising restaurants in one of the three market areas described above.

Hospital and health care institutions, included in this class, are limited to those identified in the American Hospital Association's annual directory, "Guide to Health Care Field", or members of the Federation of American Hospitals.

Retail grocers—any person or entity who purchased refined sugar for eventual resale as sugar for use or incorporation by consumers in a variety of foodstuffs or beverages for human or animal consumption.

Wholesalers—all persons or entities who directly purchased refined sugar as wholesalers for resale as sugar in either the original package or repackaged.

THE CLASSES ESTABLISHED BY THE COURT

The classes to which this Notice pertains are:

(A) *For the Chicago-West Territory*

Subclass One—consisting of all *industrial sugar users* in the Chicago-West territory who pur-

chased refined sugar in this area during the period from 1955 to present

Subclass Two—consisting of all *retail grocers* in the Chicago-West territory who have purchased refined sugar in this area during the period from 1955 to present

(B) *For the California-Arizona Territory*

Subclass One—consisting of all *industrial sugar users* in the California-Arizona territory who purchased refined sugar in this area during the period from 1949 to present

Subclass Two—consisting of all *retail grocers* in the California-Arizona territory who purchased refined sugar in this area during the period from 1949 to present

(C) *For the Intermountain-Northwest Territory*

Subclass One—consisting of all *industrial sugar users* in the Intermountain-Northwest territory who purchased refined sugar in this area during the period from 1949 to present

Subclass Two—consisting of all *retail grocers* in the Intermountain-Northwest territory who purchased refined sugar in this area during the period from 1949 to present

(D) *For the Chicago-West, California-Arizona, and Intermountain-Northwest Territories*

consisting of all persons or entities in the three territories previously defined who directly or indirectly purchased refined sugar as wholesalers during the period from 1949

to the present for resale as sugar in either the original package or repackaged.

Excluded from these classes are (1) the defendants, their subsidiaries and affiliated business entities, and (2) each plaintiff who has instituted and presently maintains a non-class action. The Plaintiffs representing each of these classes are listed at the end of this Notice.

Separate notice is being sent to Government entities which purchased refined sugar, and purchasers of molasses for agricultural use, which entities are not members of the classes to which this Notice applies by virtue of purchases.

PROPOSED PARTIAL SETTLEMENT

A proposed partial settlement totalling \$24,000,000 has been reached with three defendants on behalf of the classes covered by this Notice, as follows: Holly Sugar Corporation (hereinafter "Holly") (\$5,000,000), Union Sugar Division of Consolidated Foods Corporation (hereinafter "Union") (\$2,500,000), and California and Hawaiian Sugar Company (hereinafter "C and H") (\$16,500,000). The proposed settlement with C and H, an agricultural marketing cooperative, includes settlement with C and H's 16 member patrons, one former member patron and five corporations that are parent corporations to various C and H member patrons (herein collectively called "C and H members"). These entities have settled without admitting liability, and the fact of such settlement is not to be taken as an indication that liability or damages will be found against the remaining defendants.

The proposed partial Settlement has been presented to the Court for its approval pursuant to Rule 23(e), Federal Rules of Civil Procedure, and the Court has author-

ized submission of the proposed settlement to the members of these classes. The Settlement Agreement has been filed with the Clerk, United States District Court, Northern District of California, and is available for your inspection. The following description is only a summary of the proposed settlement, and you are referred to the Settlement Agreement for its complete terms and provisions.

The settlement monies have been deposited in interest-bearing trust accounts for the benefit of the plaintiffs and members of the classes to which this Notice applies. The settling defendants have retained the right to withdraw from the proposed settlement if in the sole judgment of the settling defendants a significant number of class members elect to be excluded from the classes. The proposed settlement relates only to defendants Holly, Union and C and H and its members, and in no way limits or affects the claims being advanced against the other defendants. The terms of the proposed settlement apply to all antitrust claims against the settling defendants arising from purchases of refined sugar delivered in the three geographic market territories covered by this Notice, and do not apply to purchases by plaintiffs and class members outside of these three market territories. The place of delivery shall determine whether the purchase is encompassed within the settlement. The proposed settlement does not apply to the governmental and agricultural molasses user classes noted above.

The proposed partial settlement also provides for the dismissal with prejudice of all counterclaims filed by Holly, Union and C and H against plaintiffs and members of the classes who are to be bound by the settlement, but in no way limits or affects counterclaims advanced by the other defendants.

It is proposed that the settlement monies will be held in trust accounts for the benefit of the plaintiffs and class

members. All interest earned on the settlement monies will be added to the principal. You will be notified when distribution will be made, and will be given an opportunity to comment on or object to any proposed plan of distribution. Any plan of distribution adopted will be subject to Court approval. At the time of distribution, the settlement proceeds will be subject to charges for costs of suit and attorneys' fees in currently undetermined amounts. Upon proper application, the Court may also allow interim reimbursement of out-of-pocket expenses to defray the costs of litigation. These amounts will be set by the Court as fair and reasonable.

You should retain and preserve whatever business records you have relating to purchases of refined sugar for use in submitting a claim, if necessary, upon distribution of any recovery in this litigation.

Unless you object to the partial settlement described above, you need not take any action regarding this settlement at this time. A further Notice will be sent to you at a later date regarding distribution of the settlement proceeds.

PLEASE TAKE NOTICE

If you are a member of one or more of the classes to which this Notice applies, you will be included in and bound by any judgment, settlement or partial settlement in this litigation, as well as any determination affecting these classes, whether favorable or not, unless you file a written election to be excluded from the classes with William L. Whittaker, Clerk of the Court, Northern District of California, P. O. Box 3784, San Francisco, California 94119, postmarked no later than February 14, 1977. If you exclude yourself from the classes herein defined, you will remain free to pursue on your own behalf what-

ever legal rights you may have. However, if you exclude yourself, you will not participate in the distribution of any recovery resulting from this litigation, including the distribution of funds resulting from the partial settlement referred to above.

If you do not elect to be excluded from the classes, you may, but need not, enter an appearance through an attorney of your choice. You will be represented by the attorneys of record for the class representatives if you do not request exclusion or enter your appearance.

NOTICE OF HEARING ON APPROVAL OF SETTLEMENT

Pursuant to Order of this Court, a hearing will be held in the courtroom of The Honorable George H. Boldt, Senior United States District Judge, 19th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California at 10:30 a.m. on March 7, 1977, for the purpose of determining the reasonableness, adequacy and fairness of the proposed partial settlement, and whether the proposed partial settlement should be approved by the Court and all actions covered by this Notice dismissed with prejudice as against the settling defendants only. If you are satisfied with this proposed settlement, you need not appear at this hearing or take any action at this time. Any member of a class to which this Notice applies may appear at the hearing and show cause, if he has, why the proposal partial settlement should not be approved. No person will be heard at this hearing unless notice of intention to appear, and all grounds for his objection, together with all supporting papers and briefs, are filed with the Clerk of the Court in writing on or before February 14, 1977, at the address stated below, and also served upon both of the following:

Josef D. Cooper, Esq.
Cooper & Scarpulla
300 Montgomery Street
Suite 600
San Francisco, California 94104

William S. Boyd, Esq.
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104

All such documents should refer to the name and number of this action: "*In re Sugar Antitrust Litigation*, (Master File No. MDL 201)." Any class member who does not make his objection in the manner provided herein shall be deemed to have waived such objection and shall be forever foreclosed from making any objection (by appeal or otherwise) to the proposed partial settlement. The filing of an objection shall not exclude the objector from any judgment entered in this action. Anyone electing to be excluded from the classes covered by this Notice will not participate in any future distribution of the settlement monies.

As more fully set forth in the Settlement Agreement, upon the approval of the proposed partial settlement by the Court becoming final, each plaintiff accepting the settlement and each class member shall be deemed to have covenanted to refrain from proceeding against the settling defendants and the C and H members on any claims which were alleged or could have been alleged in these actions up to July 2, 1976 pertaining to purchases of refined sugar delivered in the three relevant geographic market territories, and based on or related to any federal or state antitrust law, or which are based on or related to any facts, matters or claims which were alleged or could have

been alleged in said actions up to the date of said agreements pertaining to refined sugar and based on or related to any federal or state antitrust laws. Under the terms of the Settlement Agreement, any similar claim based upon deliveries to plaintiffs and class members outside of the three geographic market territories shall be dismissed without prejudice.

FILING DOCUMENTS OR ELECTION TO BE EXCLUDED.

All documents that you file in this litigation should be addressed to:

William L. Whittaker
Clerk, United States District Court
Northern District of California
P.O. Box 3784
San Francisco, California 94119

The postmark on your envelope will determine if any document has been filed timely with the Court.

ADDITIONAL INFORMATION REGARDING THIS NOTICE

If you have any questions which you want to raise concerning the matters dealt with in this Notice, please direct your inquiries to the following members of Plaintiffs' Notice Committee:

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San Francisco, California 94104

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Wholesaler Class

John H. Boone, Esq.

Boone, Schatzel, Hamrick & Knudsen

235 Montgomery Street, Suite 420

San Francisco, California 94104

Telephone: (415) 788-0656

The pleadings and other records in this litigation may be examined and copied at any time during regular office hours at the office of the Clerk, United States District Court, 18th Floor, 450 Golden Gate Avenue, San Francisco, California.

Dated: January 15, 1977

WILLIAM L. WHITTAKER,
Clerk,

United States District Court.

CLASS REPRESENTATIVES

CHICAGO-WEST TERRITORY

Subclass A: Industrial Users

Genesis Group, Inc.

Superior Beverage Company, Inc.; Edwards Old Orchard Restaurant, Inc.; Randhurst Corned Beef Center, Inc.

Baldi Candy Company

Anthony J. Pizza Food Products Corporation; T.C.H., Inc.; Herb Alpert's Donut Shop, Inc.

Plantation Baking Company, Inc.

Zion Industries, Inc. and McCleary Industries, Inc.

Home Juice Company and Bodines, Inc.

Schulze and Burch Biscuit Co.

Grist Mill Co.

Bresler Ice Cream Co.

Goelitz Confectionary Company

Milford Canning Company

Tri-R Vending Service Co.

Sethness Greenleaf Inc.

Merchants Restaurant, Inc.; Regency Steak House, Inc.; #2 Regency Steak House, Inc.

Blums of San Francisco, Inc. and Villager Foods, Inc.

Imperial Preserves, Inc.

Ewald Bros., Inc.

Seeco, Inc. and W. R. Grace & Co.

The Brothers Restaurants, Incorporated

Steak-O-Rama, Inc. and Steak-O-Rama No. 1, Inc.

Zarda Brothers Dairy, Inc. and the Page Milk Company

Schwan's Sales Enterprises, Inc.

International Industries, Inc.; The International House of Pancakes; Love's Enterprises, Inc.; The Original House of Pies, Inc.; Copper Penny Corporation; E.H.R. Corporation

Subclass B: Retail Grocers

Treasure Island Foods, Inc.

Courtesy Food Mart, Inc. and "Store No. 2" Courtesy Foods, Inc.

M. A. Lopez Supermarket, Inc. and M. A. Lopez Supermarket

CALIFORNIA-ARIZONA TERRITORY

Subclass A: Industrial Users

Sun Garden Packing Company

Eng-Skell Company

Zim's Restaurants, Inc.

Paoli's Restaurant, Inc. and Contemporary Foods, Inc.

Fantasia Confections, Inc.

Blums of San Francisco, Inc. and Villager Foods, Inc.

Mother's Cake & Cookie Co.

King Kelly Marmalade Company; Tropical Preserving Company and Knott's Berry Farm

General Bottlers, Inc. and Nesbitt Bottling of El Monte

International Industries, Inc.; The International House of Pancakes; Love's Enterprises, Inc.; The Original House of Pies, Inc.; Copper Penny Corporation; E.H.R. Corporation

Scandia Bakery

Subclass B: Retail Grocers

Raleys Inc. and Bel Air Mart, Inc.

Food Mart-Eureka; Food Mart-McKinleyville; Food Bowl Shopping Center; Quadro, Inc.; Vallegra's Drive-In Markets, Inc.

INTERMOUNTAIN-NORTHWEST TERRITORY

Subclass A: Industrial Users

Armand's Inc.; Scott's Food Service; Scott's Food Service, Inc.; International Kings Table, Inc.; International Kings Table of Rosewood, Inc.; International King's Table of Lancaster, Inc.

Eng-Skell Company

Mother's Cake & Cookie Co.

Northwest Packing Co.; Flavorland Foods, Inc.; Grandma Cookie Co.

International Industries, Inc.; The International House of Pancakes; Love's Enterprises, Inc.; The Original House of Pies, Inc.

Subclass B: Retail Grocers

John's Food Centers, Inc. and Davis Bake Shop

WHOLESALESALE

CFS-Continental-Los Angeles, Inc.; Continental-San Diego, Inc.; Continental-P.M. Inc.; Continental-G&M Foods, Inc.; Price Wholesale Grocery, Inc.; Continental-Palomar of Arizona, Inc.; Continental-Minnesota, Inc.; Continental-Indianapolis, Inc.; Continental-Hoxie, Inc.; Continental-South Chicago, Inc.; Continental-Kell, Inc.; Continental North Chicago, Inc.; Continental Coffee Company of Houston; Continental-Decatur, Inc.; Continental Coffee Company of Colorado; Polunsky's Inc.; Continental Big Red, Inc.; Continental-Panetta, Inc.; Continental Warehouse Market, Inc.; Continental-Artic, Inc.; Continental-National, Inc.

United A.G. Cooperatives, Inc.

Piedras Negras Wholesale; Saldana & Garza, Inc.; Amezcu Sales and Service

Please include or refer to this label, and the accompanying number when making inquiry.

WILLIAM L. WHITTAKER
Clerk, United States District Court
Northern District of California
P.O. Box 3784
San Francisco, California 94119FIRST CLASS
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PAID
Permit No. 11989
San Francisco, CA.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—
MDL-201
—

IN RE SUGAR ANTITRUST LITIGATION

—
**ORDER RE DEFENDANT NATIONAL SUGARBEET
GROWERS FEDERATION'S (NSGF) MOTION TO
DISMISS FOR LACK OF JURISDICTION AND
PROPER VENUE.**

In the Order of December 23, 1975, the Court concluded that jurisdiction was lacking and venue improper with respect to plaintiff's claims against defendant NSGF filed in California, Minnesota and Illinois Districts. Although the Court considered severance and transfer of the claims preferable to dismissal, counsel were given an opportunity to file supplemental memoranda concerning the efficacy of a transfer of the NSGF claims and the location of a satisfactory forum for transfer.

The supplemental memoranda have been received, fully considered and the Court concludes that no useful purpose would be served by dismissing or transferring, for all purposes, the claims against defendant NSGF only to have them refiled in the District of Colorado and transferred to this Court by a further order from the Judicial Panel on Multidistrict Litigation.

IT IS HEREBY ORDERED that the claims against defendant NSGF filed in District Courts in the states of California, Minnesota, Illinois or other states shall and hereby are severed and deemed transferred to the Dis-

trict of Colorado as the proper transferor court. Provided that; the files in the cases will be retained by the clerk of the transferee court in San Francisco until the pretrial proceedings are completed at which time the MDL-201 transferee judge will determine what court of courts are the appropriate forums for trial, after full consideration of the best interests of the parties, counsel and the Court.¹

Accordingly, counsel for defendant NSGF are directed to forthwith prepare and serve upon the Court and liaison counsel appropriate papers authorizing:

1. The severance of defendant NSGF from actions filed or to be filed and transferred to MDL-201; and

2. The transfer of plaintiffs' claims² against defendant NSGF to the District of Colorado consistent with the purposes and limitations on such a transfer specified above.

IT IS HEREBY SO ORDERED this 4th day of March, 1976.

GEORGE H. BOLDT

Sr. United States District Judge

1. See Rule 11, Rules of Procedure of the Judicial Panel on Multidistrict Litigation; *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 374 (SDNY 1973) and cases cited therein.

2. Excluding those claims or actions filed in the District of Colorado against defendant NSGF.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—
MDL-201
—

IN RE SUGAR ANTITRUST LITIGATION
—

**ORDER RE DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO ANSWER OR TIMELY
ANSWER DEFENDANTS' CLASS ACTION
INTERROGATORIES.**

In the Court's Order of December 23, 1975, counsel were directed to serve and file supplemental memoranda concerning Defendants' Motion to Dismiss for failure to answer or timely answer defendants' class action interrogatories. The memoranda having been received, fully reviewed and considered, the Court hereby finds and holds that if class action is certified, the following plaintiffs shall be ineligible for class or subclass representative status:

Civil No. C-75-0504 Chateau International Cuisine, Inc., Donut Hole, Inc., Ling Chinese Foods, Inc., Ling Wong Restaurant, Inc., and The Menu Tree, Inc.

Civil No. C 75-0505 Renshaw's A&W of Springfield, Inc., Couch E. Wallace and Washington A&W, Inc.

Civil No. C 74-1123 Heinemann's, Inc.

The foregoing plaintiffs, not having served and filed answers to the portions of defendants' class action inter-

rogatories not objected to shall do so on or before *Monday, March 22, 1976*. The case of any plaintiff above named who fails to comply within the time provided is hereby dismissed with prejudice for gross and inexcusable failure of timely prosecution of the action.

Those plaintiffs identified by defendants as filing late or untimely answers to defendants' class action interrogatories but not precluded by the Court from becoming class representatives, if class action is certified, are found not chargeable with inexcusable delay upon the showing made by them in their memoranda in response to defendants' motion to dismiss.

IT IS HEREBY SO ORDERED this 4th day of March, 1976.

GEORGE H. BOLDT

Sr. United States District Judge

IN THE
Supreme Court of the United States
OCTOBER TERM, 197..

No. 77-4

IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION,
CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT
WESTERN SUGAR COMPANY, AND U AND I INCORPORATED,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA,
Respondent.

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
(Civil No. C75-1123, et al.)
Real Parties in Interest.

**REPLY TO BRIEF OF REAL PARTIES IN INTEREST
IN OPPOSITION TO PETITION FOR WRIT OF
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OF APPEALS FOR THE NINTH CIRCUIT**

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On Behalf of All Pctitioners

TABLE OF CONTENTS

	Page
I. Contrary to the Contention of the Real Parties in Interest, the Decision of the District Court Is Inconsistent with This Court's Decision in <i>Berger v. United States</i>	2
II. The Contention That Petitioners' Motion and Affidavits to Disqualify Were Untimely Filed Is Without Merit	4
III. The Contention That Intervention of This Court Is Not Required to Clarify a Controlling Issue of Law on Which There Is a Conflict of the Circuits Is Without Merit	6

TABLE OF AUTHORITIES

CASES:

<i>Berger v. United States</i> , 255 U.S. 22 (1921)	2
<i>Bradley v. Milliken</i> , 426 F.Supp. 929 (E.D. Mich. 1977) ..	7
<i>Duplan Corp. v. Deering Milliken</i> , 400 F.Supp. 497 (D. S.C. 1975)	3
<i>Parrish v. Board of Commissioners of Alabama State Bar</i> , 524 F.2d 98 (5th Cir. 1975), <i>cert. denied</i> , 425 U.S. 944 (1976)	6, 7
<i>S.C.A. Services Inc. v. Morgan</i> , No. 77-1194 (7th Cir. June 17, 1977)	4, 5
<i>Spires v. Hearst Corp.</i> , 420 F.Supp. 304 (C.D. Cal. 1976)	8
<i>United States v. Ritter</i> , 540 F.2d 459 (10th Cir.), <i>cert. denied</i> , — U.S. —, 97 S.Ct. 370 (1976)	6, 7
<i>United States v. Cowden</i> , 545 F.2d 257 (1st Cir.), <i>cert. denied</i> , — U.S. —, 97 S.Ct. 1181 (1977)	7
<i>United States v. Dodge</i> , 538 F.2d 770 (8th Cir. 1976), <i>cert denied sub nom. United States v. Escamilla</i> , — U.S. —, 97 S.Ct. 119 (1977)	7
<i>Webbe v. McGhie Land Title Co.</i> , 549 F.2d 1358 (10th Cir. 1977)	7

ii	Table of Authorities (continued)	Page
STATUTES:		
28 U.S.C. § 144		2
28 U.S.C. § 455(a)	2, 5, 6, 7, 8	
MISCELLANEOUS:		
S. Rep. No. 93-419, 93rd Cong., 1st Sess. 2 (1973)		7
H.R. Rep. No. 93-1453, 93rd Cong., 2d Sess. 2 (1974)		7

IN THE
Supreme Court of the United States

OCTOBER TERM, 197..

 No.

IN RE SUGAR ANTITRUST LITIGATION
 (MDL No. 201)

 THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION,
 CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT
 WESTERN SUGAR COMPANY, AND U AND I INCORPORATED,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
 OF CALIFORNIA,
Respondent.

 ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
 (Civil No. C75-1123, et al.)
Real Parties in Interest.

**REPLY TO BRIEF OF REAL PARTIES IN INTEREST
 IN OPPOSITION TO PETITION FOR WRIT OF
 CERTIORARI TO THE UNITED STATES COURT
 OF APPEALS FOR THE NINTH CIRCUIT**

 This brief is filed in response to the Brief on Be-
 half of Real Parties in Interest in Opposition to
 Petition for Writ of Certiorari to the United States

Court of Appeals for the Ninth Circuit (hereafter "R.P. Br."), in order to demonstrate that nothing contained in that Brief is responsive to petitioners' basic contention, that intervention by this Court is required to clarify the standards to be applied by federal judges in ruling upon motions to disqualify brought under the recently amended Section 455(a) of the Judicial Code and the other significant disqualification statute, 28 U.S.C. § 144.

I. Contrary to the Contention of the Real Parties in Interest, the Decision of the District Court Is Inconsistent with This Court's Decision in *Berger v. United States*.

The real parties in interest (plaintiffs below) assert that the district court followed this Court's decision in *Berger v. United States*, 255 U.S. 22 (1921), by "accepting [petitioners'] allegations as true." (R.P. Br. 15.) This assertion is flatly contradicted by the record. In fact, Judge Boldt ignored entirely many of petitioners' factual allegations, especially those involving his *ex parte* communications with opposing counsel,¹ and rejected others as false.²

¹ The *ex parte* communications ignored by Judge Boldt in his Memorandum Decision below include (1) his conversation with Mr. Ferguson concerning transfer of the 1812 case (Pet. 6); (2) his communications with Mr. Ferguson concerning appointment of Mr. Ferguson as permanent Chairman of Plaintiffs' Steering Committee (Pet. 7); and (3) his conference with Mr. Ferguson concerning class action procedures and scheduling (Pet. 7). Judge Boldt briefly acknowledged, but did not attempt to explain or justify, his *ex parte* telephone conversation with Mr. Ferguson concerning the Holly settlement and other prospective settlements (Petitioners' Appendix 11a-12a).

² The respects in which Judge Boldt expressly rejected petitioners' factual allegations are set forth in the Petition, p. 18.

In an attempt to justify Judge Boldt's improper treatment of petitioners' allegations, the real parties in interest concede that he "did not write a lengthy opinion setting forth all the relevant facts and law," but argue that he had no obligation to do so. (R.P. Br. 16, n.1.)³ Judge Boldt's failure to set forth or consider the facts involving his *ex parte* communications is especially significant, however, since had he properly considered them, he would have had no alternative but to find in them more than adequate support for petitioners' charge of bias and prejudice and their conviction that his impartiality had reasonably been questioned. Petitioners submit that no explanation could allay the fear of prejudice aroused by *ex parte* communications between a district judge and the Chairman of Plaintiffs' Steering Committee, his close personal friend, with respect to matters of substance in the litigation.

It is not true, as the real parties in interest assert, that petitioners "allege that the district court's personal friendship with one of plaintiffs' counsel supports charges of impropriety, personal bias, and prejudice." (R.P. Br. 21.) It is not Judge Boldt's personal friendship with Mr. Ferguson, but rather the continu-

³ While an exhaustive opinion may not be necessary in all cases seeking disqualification, a more complete and comprehensive opinion is clearly required where, as here, the factual allegations are serious and detailed, the legal issues significant and complex, and plaintiffs seek hundreds of millions of dollars in a massive multi-district antitrust class action proceeding involving several hundred parties. We would suggest that the Court contrast Judge Boldt's Memorandum Decision below (Petitioners' Appendix 10a-13a) with the comprehensive and scholarly opinion of Judge Hemphill in *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C. 1975).

ing abuse of that friendship in a series of *ex parte* communications, that supports petitioners' charges.

As the district court below failed to discuss or justify these *ex parte* contacts, so do the real parties in interest ignore them in their brief. They assert, in that portion of their brief in which they contend that petitioners have failed to show bias, prejudice, or impropriety, that "not one of Petitioners' allegations substantiates charges that the district court's impartiality can reasonably be questioned." (R.P. Br. 20.) Yet the *ex parte* contacts described above, as well as Judge Boldt's misstatements of fact and the other factual allegations set forth in the Petition (pp. 4-14), clearly justify petitioners' charges. Those contacts, like the improper *ex parte* conversation between a district judge and his brother in another recent disqualification case, create "an impression of private consultation and appearance of partiality which does not reassure a public already skeptical of lawyers and the legal system." *SCA Services, Inc. v. Morgan*, No. 77-1194, slip op. at 10 (7th Cir. June 17, 1977).

II. The Contention That Petitioners' Motion and Affidavits to Disqualify Were Untimely Filed Is Without Merit.

The real parties in interest oppose granting of the petition on the ground that the motion and affidavits of bias and prejudice below were not timely filed (R.P. Br. 22), an argument made in the district court, but neither accepted by the district court nor addressed by the court of appeals. In fact, the motion and affidavits below were timely filed.

It was the cumulative impact of a series of events which compelled petitioners to file the motion and

affidavits below. The two events which triggered the filing below occurred on August 25 and September 9, 1976.⁴ Shortly thereafter, counsel for the petitioners conferred and determined to inform Judge Boldt promptly of their decision to file a motion to disqualify and accompanying affidavits. On September 13, 1976, petitioners attempted to arrange a conference with the court and liaison counsel for plaintiffs on either September 15 or September 16 in order to present this matter to Judge Boldt and to ask that all proceedings be suspended until filing could be accomplished. In fact, this presentation was made on September 23, 1976. The motion to disqualify and the accompanying affidavits were filed on October 18, 1976.

Even assuming *arguendo* that the affidavits were not filed in timely fashion, that fact would not affect the propriety of consideration of the disqualification issue by Judge Boldt or by this Court, since the motion to disqualify was also brought under 28 U.S.C. § 455 (a), which has no timeliness requirement. As the Sixth Circuit recently held in rejecting a similar timeliness argument in *SCA Services, Inc. v. Morgan*, slip op. at 11-12:

"The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed 'that confidence in the impartiality of federal judges is enhanced by a more strict treat-

⁴ These were the statement in Judge Boldt's pretrial order of August 25, 1976 asserting his lack of familiarity with the terms of the settlement agreement prior to his determination of class motions, and his misstatements on the record in the Fertilizer Cases on September 9, 1976 concerning his lack of knowledge of the settlement agreement. (Petition 10-13)

ment of waiver.' They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. Moreover, although the Department of Justice recommended that the new section 455 should include some limitation of time 'to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before,' (H.R. Rep. No. 1453, 93d Cong., 2d Sess. 9 (1974)), Congress did not incorporate this recommendation in the statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit." (Footnotes omitted)

III. The Contention That Intervention of This Court Is Not Required To Clarify a Controlling Issue of Law on Which There Is a Conflict of the Circuits Is Without Merit.

The real parties in interest dispute petitioners' reading of *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, — U.S. —, 97 S.Ct. 370 (1976); and the Memorandum Decision of Judge Boldt below. We are confident, however, that a careful reading of these decisions will demonstrate that sufficient conflict and confusion exist with respect to the proper standards to apply under amended 28 U.S.C. § 455(a) to require prompt clarification by this Court.

An analysis of the judicial interpretations of amended Section 455(a) reveals considerable uncertainty as to the amendment's effect. Unless definitive

action is taken by this Court, this uncertainty will continue to undermine the congressional effort to amend Section 455(a) so as to "broaden and clarify the grounds for judicial disqualification."⁶

In *Parrish v. Board of Commissioners*, three different standards were proposed by various members of the court as appropriate for use in deciding motions under § 455(a). The majority appears to have adopted a test that focuses on whether the facts support a reasonable inference of impartiality, a requirement that is tantamount to requiring a showing of bias in fact. (524 F.2d at 103-04.) Judge Brown, specially concurring, felt that the statute requires a court to determine whether "a reasonable person could reasonably have a belief of bias." (524 F.2d at 104.) Finally, Judge Tuttle, in dissent, argued that the test should be whether "the facts be such, their truth being assumed, as to convince a reasonable man that the affiant reasonably believed that bias exists." (524 F.2d at 108.) These various opinions are the source of divergent lines of cases following the majority⁶ and minority positions. The leading case to follow the more liberal approach to the amended statute taken by Judge Tuttle and Judge Brown is *United States v. Ritter*.⁷

⁶ H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 2 (1974); S. Rep. No. 93-419, 93d Cong., 1st Sess. 2 (1973).

⁶ Cases which appear to adopt the approach of the majority in *Parrish* include *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir.), *cert. denied*, — U.S. —, 97 S.Ct. 1181 (1977); *United States v. Dodge*, 538 F.2d 770, 782 (8th Cir. 1976), *cert. denied sub nom. United States v. Escamilla*, — U.S. —, 97 S.Ct. 1119 (1977); and *Bradley v. Milliken*, 426 F. Supp. 929, 933-35 (E.D. Mich. 1977).

⁷ Other cases appearing to follow the liberal minority approach

The district court below appears to have adopted an extreme version of the approach of the *Parrish* majority, applying a "subjective" test of whether *he himself* believed that there was a "reasonable" basis for his disqualification. Unfortunately, Judge Boldt did not cite or discuss either the relevant statutes or any of the cases decided thereunder in his Memorandum Decision. The absence of clarity and of legal analysis in the opinion below should not prejudice petitioners in this Court, but rather should serve to underscore the need for this Court's intervention. In this way alone may this Court assure fulfillment of the intent of Congress in strengthening the disqualification provisions applicable to the federal judiciary in the 1974 amendments to Section 455(a).

* * *

In conclusion, this Court should grant the petition in order to:

(1) reaffirm its holding in *Berger* that a federal judge who is asked to disqualify himself must accept as true the factual allegations upon which the application is based, whether disqualification is sought under Section 144 or amended Section 455(a);

(2) establish that the test to be applied under Section 455(a) is an "objective" test of whether a reasonable man would conclude that a person in the position of the moving party might reasonably question the impartiality of a federal judge, rather than a "subjective" test of the judge's own evaluation of whether bias or prejudice in fact exists; and

are *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977), and *Spires v. Hearst Corp.*, 420 F. Supp. 304, 306-07 (C.D. Cal. 1976).

(3) affirm that the "duty to sit" may not properly be invoked by a federal judge in deciding motions brought under Section 455(a).

CONCLUSION

For the reasons set forth above we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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